Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.
PETITIONER

v.

TOWN OF MONROE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1 In light of this Court's recent decision in Dolan v. City of Tigard, 512 U.S. __ , (1994), did the respondent, which is a local government, violate the constitutional prohibition against taking private property without just compensation when it demanded as a condition of approving the petitioner's subdivision application that the petitioner deed to the respondent 10% of the subdivision even though the respondent never made an individualized determination that the land it demanded was related both in nature and extent to the impact of the subdivision and the respondent actually admits that it has not had any discussions or plans to use the land?

2 In light of this Court's recent decision in Dolan v. City of Tigard, supra, did the Connecticut courts correctly rule that it is the landowner rather than the local government which has the burden of proof on the issue of whether the local government's demand for land as a condition for zoning approval is not justified?

B. LIST OF PARTIES.

The parties are the same as in the caption of the case, to wit: the petitioner John C. Mandanici, Jr., and the respondent, the Town of Monroe, Connecticut. Said parties were the only parties who appeared and who were involved in the petitioner's appeal to the Appellate Court of Connecticut whose judgment on that appeal the petitioner now seeks this Court to review. Other parties were involved at the trial level concerning the respondent's original complaint against the petitioner but they were not involved in the petitioner's unrelated counterclaim that the petitioner brought against only the respondent and which was the subject of the said appeal and now the subject of this Petition.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS.

The opinion of the Appellate Court of Connecticut on the petitioner's direct appeal is officially reported as Town of Monroe v. John C. Mandanici, Jr., et al. 34 Conn. App. 915(1994). The opinion is unofficially reported at 642 A2d 759(1994), and is reprinted in the Appendix to this Petition, App. 2a. The petitioner's timely filed Petition For Certification was denied by the Supreme Court of Connecticut and that decision is officially reported as Town of Monroe v. John C. Mandanici Jr., et. al, 231 Conn. 929(1994). That decision is not yet unofficially reported. It is reprinted in the Appendix to this Petition, App. 5a.

E. STATEMENT OF GROUNDS OF JURISDICTIONT

The judgment of the Appellate Court of Connecticut was entered on May 24, 1994. The Appellate Court on June 22, 1994, denied the petitioner's timely filed Motion For Reargument And Reconsideration, and Motion For Reargument En Banc (App. 3a, 4a). The Supreme Court of Connecticut on October 13, 1994, denied the petitioner's Petition For Certification (App. 5a).The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1257(a).

F. CONSTITUTIONAL PROVISIONS

The Fifth Amendment states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment states:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

G. STATEMENT OF THE CASE

The respondent, Town of Monroe, demanded that the petitioner, John C. Mandanici, Jr., deed to the respondent 10% of his proposed subdivision as a condition for the respondent's approval of that subdivision. The respondent in its demand relied on a subdivision regulation which alllowed it to take an unspecified percentage of land in a proposed subdivision for the specific purpose of using that land as "open spaces for parks and playgrounds". The petitioner deeded the land, consisting of 1.26 acres, to the respondent and the respondent approved the subdivision. As a counterclaim to a later tax case brought by the respondent, the petitioner claimed that the respondent had used imposition and duress to cause the petitioner to deed the said land to the respondent, and furthermore he claimed that the land that had been taken was not being used for any purpose and certainly not for the purpose for which it was taken, and thus he claimed that the taking did not substantially advance the legitimate state interest of the respondent. The petitioner asserted that the respondent had violated the petitioner's federal constitutional right against private property being taken for public use without just compensation. The petitioner relying on common law claimed that since imposition and duress were used by the respondent to get the land, then the respondent held the land in a constructive trust and should return it to the petitioner.

At the hearing on the counterclaim in 1993, Daniel Tuba, the respondent's Town Clerk, Clerk of the Planning and Zoning Commission, and clerk of the Zoning Board of Appeals, testified that there was a "long standing policy" of

the respondent to require an applicant for a subdivision of 10 plus building lots or 10 plus acres to deed to the respondent 10% of the total subdivision as open spaces. The demand was pursuant to Section 3.4 of the subdivision regulations which allowed the respondent to demand an unspecified amount of open spaces as a condition of zoning approval. Tuba testified that the petitioner's subdivision was such a 10 plus lot subdivision and that the land he deeded to the respondent constituted 10% of the subdivision(Trial transcript of July 15, 1993, hereafter referred to as T., pp. 63-68).

Tuba further testified that a study was never done as to whether the 10% parcel of land given up by the petitioner was needed to fulfill the needs of the respondent(T 115). He testified that the 10% parcel of land given up by the petitioner was not needed for any rights of way or easements(T 77). He testified that the respondent has not had any discussions or plans to use the 10% parcel of land nor was there any present intention as to what will be done with the parcel(T 73-75).

The trial court factually found that the respondent's attorney had "insisted on the (petitioner) providing a deed" for a parcel of open spaces which constituted 10% of his 11 lot subdivision. The court found that the respondent "requir(ed) of all subdivisions of 10 or more lots" "approximately ten percent of the development" to be deeded to the respondent as open spaces. The trial court found that the respondent's attorney was relying on a subdivision regulation which allowed the respondent to receive as open spaces an unspecified percentage of any subdivision as a condition for giving approval for the subdivision. As noted by the trial court, the petitioner testified that he "did not want to give" up the land but believed that he "had to give up" the land to get the approval. The petitioner gave up the land in 1986 and received the approval for a 10 lot subdivision. The trial court found that the land from 1986 to the present time "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground".(App. 7a - 9a). Despite the above finding, the trial court ruled that the demand for the open spaces was constitutional under Nollan v. California, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677(1987), and that the demand was proper under the zoning regulations that allowed the respondent to demand land for

parks and playgrounds as a condition for the approval of a subdivision(App 9a - 11a).

The petitioner consistently asked the Appellate Court of Connecticut to await this Court's decision in Dolan v. City of Tigard, 512 U.S. - , 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994),prior to making a ruling. In a Motion To Postpone Oral Argument dated April 21, 1994, at oral argument on April 27, 1994, and in his Motions For Reargument dated June 2, 1994, the petitioner informed the Appellate Court of the issues in and the pendency of the Dolan case and asked the court to await that decision. However, the Appellate Court issued its terse per curiam decision(App. 2a) and denied the Motions For Reargument (App. 3a , 4a) prior to the release of the Dolan decision. After the Dolan decision was announced, the petitioner timely filed a Petition For Certification to the Supreme Court of Connecticut in which he stressed the importance of the Dolan decision. However, the Supreme Court of Connecticut denied the Petition without comment (App. 5a).

H. STAGE AT WHICH FEDERAL QUESTIONS WERE RAISED.

In his counterclaim filed in the trial court, the petitioner claimed that the "actions of the (respondent) in using duress and imposition to cause the (petitioner) to quitclaim said land as a condition for approving his subdivision were acts that violated his rights against private property being taken for public use without just compensation, said rights being enumerated in ... the Fifth and Fourteenth Amendments to the United States Constitution."(Counterclaim, par. 5).

In his briefs to the trial court, the petitioner repeated his above constitutional claim and relied heavily on Nollan v. California,, supra, where this Court discussed the conditions a local zoning authority must meet so that its demanding land as a condition of zoning approval does not become a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments. (See petitioner's Trial Brief dated July 14, 1993, pp. 4-5; and his Reply And Supplemental Brief, dated August 13, 1993, pp. 2-3,9-10). The trial court rejected the petitioner's said constitutional

claims and Nollan arguments by first factually ruling that the land taken in 1986 could be developed in the future as a park or playground, and was presently being used in 1993 for "light and air" as mentioned in the preamble to the Subdivision Regulations(App 8a- 10a). The trial court ruled that such a taking as a condition for the approval of a subdivision substantially advanced a legitimate state interest and thus did not violate the principles set forth in Nollan v. Calif., supra, and did not violate the Fifth and Fourteenth Amendments' prohibition against private property being taken without just compensation. (App. 6a, 10a - 11a).

Concerning a connection between the land taken and the impact of the subdivision, the trial court essentially ruled that the approval of the subdivision would obviously result in additional residents who would live on the subdivision but who would also require recreational opportunities in the immediate area. The trial court referred to the portion of the respondent's Master Plan on Recreation and Open Space which states that "opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well being of the community." The trial court stated that such open spaces were needed to be "within a reasonable distance of all residents' homes." (App. 11a). The trial court concluded that the taking of the land was not unconstitutional but a valid exercise of the respondent's police powers.(App. 10a - 11a)

The trial court also ruled that the petitioner had the "heavy burden" of proving "beyond all reasonable doubt" that the taking was unconstitutional. (App. 10a).

In his brief to the Appellate Court of Connecticut, the petitioner argued that the constitutional principles set forth in Nollan v. Calif., supra, were violated because there was no substantial advsancement of a legitimate state interest by taking land to be unused and vacant, and further argued that there was no real connection between the land taken and the impact of the subdivision. (See petitioner's brief to the Appellate Court, pp. 24-30). The Appellate Court denied the petitioner's repeated requests to postpone any decision until the case of Dolan v. City of Tigard, supra, was decided by this Court. (See petitioner's Motion To Postpone Oral

Argument, dated April 21, 1994; transcript of oral argument of April 27, 1994; and Motions For Reargument, dated June 2, 1994). One month before this Court's release of its decision in the Dolan case, the Appellate Court on May 24, 1994, affirmed without an opinion the rulings of the trial court regarding the petitionerr's constitutional claims. (App. 2a).

In his Petition For Certification to the Supreme Court of Connecticut timely filed after the release of the Dolan decision, the petitioner repeated his above constitutional calims and further argued that the taking also violated the constitutional principles set forth in the Dolan decision. The petitioner claimed that under Dolan there should be an individualized determination by the respondent that the open spaces taken were related in nature and extent to the impact of the subdivision. He also claimed that under Dolan, the respondent had the burden of proof. He stated that there was no such individualized determination concerning the taking of his land and that the trial court had placed the burden of proof on him. He also argued that the Dolan decision was retroactive and applicable to his case. (See petitioner's Petition For Certification to the Supreme Court of Connecticut, dated July 11, 1994, pp. 1-3, 6-12). The Supreme Court denied the Petition without comment.(App. 5a).

J. ARGUMENT

1. UNCONSTITUTIONAL TAKING

The petitioner claims that the respondent violated his federal constitutional right against private property being taken without just compensation. In Dolan, supra, 114 S. Ct. 2316, it was noted that the "Takings Clause of the Fifth Amendment of the United States Constitution made applicable to the States through the Fourteenth Amendment (citation omitted) provides: Nor shall private property be taken for public use without just compensation." The Court further observed that "(w)e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amentment or Fourth Amendment should be relegated to the status of a poor relation". Id., 2320.

In Nollan, supra, 483 U.S. 837, this Court stated that some zoning boards have an "out and out plan of extortion" to get landowners to give up property rights in order to get zoning approval. The Court also held that whenever a landowner must yield a property interest to get zoning permission, such a "yielding of a property interest can not be regarded as establishing (a) voluntary exchange." Id. 834, n. 2.

When this Court in Nollan discussed "extortion" by zoning boards, Id. 837, it cited J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A2d 12, 14-15(1981), and in that case the court held that the subdivision regulation that previously caused a developer to deed land to the town for playgrounds as a condition for approval of his subdivision was an unconstitutional regulation. The court ordered the town to give back the land to the developer while leaving the approval of the subdivision intact.

In Dolan, supra. 114 S. Ct. 2317, this Court cited J.E.D., as the single authority for its holding in Nollan that the government authority in that case was "simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into 'an out- and - plan of extortion' ". Thus this Court in both Nollan and Dolan relies on a case similar to the present case where a landowner is trying to get the land back that he had been required to give away to get zoning approval. [1]

---

1. In the present case, the legal mechanism of a constructive trust based on common law principles allows the petitioner to regain his property. (See petitioner's brief to the Appellate Court, pp. 14-17). The elements of imposition and duress needed to trigger a constructive trust were present since there was surely a type of "extortion" as mentioned in the Nollan and Dolan cases, and also as mentioned in Nollan, supra, 483 U.S. 834, n. 2, the "yielding of a property interest [to get zoning approval] cannot be regarded as establishing (a) voluntary exchange." There is no statute of limitations regarding a constructive trust but a government could always raise a defense of laches which was not raised in the present case.

In Nollan, this Court held that there are two requirements that must be met in order for a government not to commit extortion nor violate the Constitution when it demands property as a condition for zoning approval. As will be discussed later, this Court in Dolan refines the second requirement. In Nollan, supra, 483 U.S. 834, this Court held that for a government to require a landowner to give up property rights as a condition of obtaining a permit, the property taken must "substantially advance legitimate state interests" and "effectuat(e) ... a substantial government purpose". The trial court in the present case found that the acre taken in 1986 "could, if and when the need develops, become a park or playground", it "is a passive park [which] ... can be utilized at any point", and "as it exists now, it provides light and air", and therefore it substantially advances a legitimate state interest. (App. 9a - 11a).

However, more on point the trial court conceded that from 1986 when the land was transferred and until the time of the court's decision in 1993, the land"has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground", and it "has had no alterations or improvements to it since 1986" when the petitioner deeded it to the respondent. (App. 8a, 9a). Such a non use clearly does not substantially advance a legitimate state interest or a substantial governmental purpose.

Of greater importance than the above principle is the further ruling in Nollan that it is unconstitutional to require a landowner to give up a part of his property in order to get a lifting of a restriction on the use of the property in general when the part of the property that is given up "fails to further the end advanced as the justification" for the original restriction. Nollan, supra, 483 U.S. 837. There must be a "nexus between the condition [imposed on the landowner of giving up some property right] and the original purpose of the building restriction" which the landowner seeks to remove. Id. The government can not just impose a condition in order "to serve some valid governmental purpose .... In short, unless the ... condition [imposed of giving up some property right] serves the same governmental **purpose** as the development ban, the building restriction is not a valid regulation of land

use but 'an out and out plan of extortion' ". Id. (emphasis added).

"The **purpose** of a subdivision regulation is to ensure that the land as divided will be of such character that it can be used for building purposes without danger to health or the public safety." Tondro, Connecticut Land Use Regulation, The Atlantic Law Book Company (1992), p. 209. (emphasis added). When a subdivision plan shows that the buildings and roads to be placed on it will not pose a danger to health or public safety, then the original restriction on the subdivision is to be lifted. The landowner is then allowed to use the land in the same way and facing the same restrictions as any other landowner outside the subdivision. In the present case, the taking of the land did not lessen any type of danger to the public health or safety, nor would allowing the petitioner to keep the land pose any danger to the public health and safety. There is no nexus between the one acre that the petitioner was forced to give up and the danger to public health and safety justification for the original building restriction on the subdivision.

Even when such a nexus does exists, the taking still can be unconstitutional if the government demands more than it needs to neutralize the development's impact. This Court in Dolan answered the question left open in Nollan of what is the "required degree of connection" between the amount of land demanded by the government and "the projected impact of the proposed development". Dolan, supra, 114 S. Ct. 2317. This Court held that there must be a "rough proportionality" between the land demanded and the project's impact. Id. 2319. This Court also held that "(n)o precise mathematical calculation is required, but [the government] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development", and it can not rely on its own "conclusory statement(s)" on the issue. Id. 2319-2320, 2322. This Court held that a finding that the land demanded "could offset some" of the development's impact was insufficient. Id. 2322.

In the present case, the respondent's Town Planner and Clerk of its zoning boards testified that no study was ever done as to whether the land demanded fulfilled any of the

respondent's needs, and that there were no prior or current discussions or plans as to what will be done with the land. (T pp. 115, 73-75). The trial court held that the land taken in 1986 "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground." (App. 8a). However, the trial court upheld the taking because the land "could if and when the need develops, become a park or playground", and it "is a passive park [which] ... can be utilized at any point", and "as it exists now, it provides light and air". (App. 9a - 11a). Such observations do not satisfy the standards of Nollan, nor the standards of Dolan regarding an individualized determination and rough proportionality.

Thus this Court should grant this Petition because the Connecticut courts have decided a federal question which clearly conflicts with this Court's decisions in the Nollan and Dolan cases. The Dolan decision is retroactive and controls the present case. "As a rule, judicial decisions apply 'retroactively' (citation omitted). Indeed, a legal system based on precedent has a built-in presumption of retroactivity." Solem v. Stumes, 465 U.S. 638, 642, 104 S. Ct. 1338, 79 L. Ed. 2d 579(1984), State of Connecticut v. Jackson, 32 Conn. App. 724, 731-732, n. 6, 630 A2d 164(1993). "(W)hen the Court has applied a rule of law to litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 544, 111 S. Ct. 2439, 115 L. Ed. 2d 481(1991)(Per Souter, J., with one Justice concurring and four Justices concurring in judgement).

For example, in the recent case of Harleston v. Jeffries, _____ U.S. ____, 63 L.W. 3385(Nov. 14, 1994), this Court in a summary disposition vacated a judgment and remanded the case to the Court of Appeals for the Second Circuit "for further consideration in light of Waters v. Churchill" 511 U.S. ___, 114 S. Ct. 1878, 128 L. Ed. 2d 686(1994). The Harleston case was decided by the Second Circuit on April 18, 1994(see 21 F.3d 1238), and the Waters case was decided by this Court six weeks later on May 31, 1994. Thus this Court remanded the Harleston case to the Second Circuit to consider an opinion of this Court which had not been released when the Second Circuit made its initial decision. A similar approach can be taken in the present case in which this Court remands

the case to the Appellate Court of Connecticut for further consideration in light of Dolan v. City of Tigard, supra.

2. BURDEN OF PROOF

This Petition should also be granted because the decisions of the Connecticut courts in this case on the burden of proof clearly conflicts with this Court's decision in Dolan regarding the burden of proof. In the present case, the trial court held that it was the petitioner's "heavy burden" to prove "beyond all reasonable doubt" that the taking was unconstitutional. (App. 10a). However, this Court in Dolan, held that the government "must make some sort of individualized determination" and in a footnote observed that the dissent was correct in stating that this Court was "placing the burden on the [government] to justify the required dedication." Dolan, supra, 114 S. Ct. 2319, 2320, n. 8. Thus the Appellate Court erred when it affirmed the trial court's ruling that the burden of proof was on the petitioner.

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K. APPENDIX

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1. THE OPINION AND JUDGMENT OF THE APPELLATE COURT OF CONNECTICUT UPON WHICH REVIEW IS SOUGHT, 34 Conn. App. 915, 642 A2d 759(1994)

TOWN OF MONROE V. JOHN C. MANDANICI, JR., ET AL(12922)

APPELLATE COURT, STATE OF CONNECTICUT
DUPONT,C.J., HEIMAN, and SCHALLER, JS.
Argued April 27--- decision released May 24, 1994

Action, in each case, to foreclose municipal tax liens on certain of the named defendant's real property, brought to the Superior Court in the judicial district of Fairfield, where the named defendant filed a counterclaim in each case; thereafter, the cases were consolidated and referred to Hon. Irving Levine, state trial referee; judgments of strict foreclosure on the complaints and for the plaintiff on the counterclaims, from which the named defendant appealed to this court.
Affirmed.

Joseph R. Mirrione, for the appellant (named defendant).

William T. Browne, with whom, on the brief, was William J. Varese, for the appellee (plaintiff).

PER CURIAM. The judgments are affirmed and the case is remanded for the purpose of setting new law days.

2. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REHEARING

NO. A. C. 12922
TOWN OF MONROE
VS.
JOHN C. MANDANICI,JR.

APPELLATE COURT
STATE OF
CONNECTICUT
JUNE 22, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED JUNE 2, 1994, FOR REARGUMENT AND RECONSIDERATION HAVING PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

Alan M. Ganusscio
ASSISTANT CLERK --
APPELLATE

3. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REHEARING EN BANC

NO. A. C. 12922
TOWN OF MONROE
VS.
JOHN C. MANDANICI, JR.

APPELLATE COURT
STATE OF
CONNECTICUT
JUNE 22, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED JUNE 2, 1994, FOR REARGUMENT EN BANC HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT

Alan M. Ganusscio
ASSISTANT CLERK -
APPELLATE

4. ORDER OF THE SUPREME COURT OF CONNECTICUT DENYING PETITION FOR CERTIFICATION

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-94-0111

TOWN OF MONROE

V.

JOHN C. MANDANICI, JR. ET AL

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the named defendant for certification to appeal from the Appellate Court (34 Conn. App. 915 [AC 12922]), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Alan M. Gannuscio
ASSISTANT CLERK-
APPELLATE

Dated: October 13, 1994
Notice sent: `10/14/94

5. MEMORANDUM OF DECISION OF THE TRIAL COURT AFFIRMED BY THE APPELLATE COURT OF CONNECTICUT

CV 92 0293224 S : SUPERIOR COURT
CV 92 0294797 S

TOWN OF MONROE : J.D. OF FAIRFIELD
VS. : AT BRIDGEPORT
JOHN MANDANICI, : SEPTEMBER 22, 1993
JR., ET AL

MEMORANDUM OF DECISION

Two cases of foreclosure of tax liens have been filed by the Town of Monroe against premises owned by the defendant John C. Mandanici, Jr. and known as 2 and 36 Fairlea Drive. The plaintiff alleges unpaid tax liens for October 1, 1986, October 1, 1987, October 1, 1988, October 1, 1989 and October 1, 1990 on both lots. The defendant Mandanici answers in both cases are duplicates and consist of an admission of ownership and a denial of the remaining allegations. By way of counterclaims the defendant alleges that the Town by duress and imposition in 1986 caused him to agree to deed to the town 1.26 acres of open space land in order to have the subdivision, of which the open space land was a part, approved. He further claims that that parcel of land did not advance a legitimate state interest of the Town relative to the subdivision regulations, violates Article 1, Section 11 of the Connecticut Constitution and the Fifth and Fourteenth Amendments of the United States Constitution, that the Town is unjustly enriched and that the Town holds the parcel in constructive trust for the defendant. By way of set off, the defendant alleges that by duress and imposition the plaintiff forced the defendant to spend money and incur costs in making additional and unnecessary improvements to the road, landscape and drainage system in the subdivision which was not part of the original approval.

Since both cases are exactly alike and the cases have been tried as one, this one Memorandum of Decision shall apply to both cases. The parties have stipulated that Lot No. 4

Fairlea Drive, Monroe, has a fair market value of $85,000.00 and Lot No. 8 Fairlea Drive, Monroe, has a fair market value of $95,000.00. They have also stipulated that $14,861.25 is the total amount of town taxes, interest and fees due on Lot No. 4 and $13,235.28 is the total amount of town taxes, interest and fees due on Lot No. 8 and that both amounts are unpaid. On the basis of the facts stated, the plaintiff is entitled to a foreclosure of its tax liens on both lots. The issue therefore is the counterclaim and set off filed by the defendant.

The court will cover the Set Off first since it will not require an extended discussion. The defendant claims that by duress and imposition he spent money and incurred costs in making additional and unnecessary improvements to the road, landscape and drainage systems, which were not part of the town's original approval. No evidence has been produced to indicate that he spent money or incurred costs of any kind, or that any additional and unnecessary improvements to the road, landscape or draining systems were made. In fact, the Town's original approval containing its requirements for the subdivision were never submitted to the court nor was any evidence introduced of addional costs and unnecessary improvements being required by the Town or made by the defendant. This claim is without merit and judgment may enter for the plaintiff on the defendant's Set Off.

With respect to the question of the taking of an open space of 1.26 acres, the facts are found as follows. In 1976 the defendant was a partner of one Iannucci in the planned subdivision, and Iannucci submitted the subdivision map to the Town Planning and Zoning Commission (PZC) which contained the 1.26 acres area which was designated as open space and which the Land Division Regulations required and which reads as follows:

> 3.4 Open Spaces: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of

land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.

The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

The submission of the parcel was not suggested or requested by anybody employed or authorized by the Town. It was offered by Iannucci because the subdivision regulations required it. The subdivision met with no success until 1986 when the defendant submitted the same map and a deed for the 1.26 acre parcel. Although the defendant describes the lot as a building lot, it does not contain the required 150 foot frontage on the highway, and could not be used unless a variance of that requirement was granted. The subdivision contained thirteen acres and had been subdivided into eleven lots, one of which was the parcel in issue and represented approximately ten per cent of the development which the PZC was requiring of all subdivisions of ten or more lots and for which the PZC usually required ten per cent of the total acreage. It is the defendant's claim that he did not want to give the parcel and that the PZC would not consider the subdivision unless the parcel was forthcoming and so the defendant furnished them with the deed. The parcel has not been used in any manner by the Town or anyone else nor had it been used as a park of playground which section 3.4 specifies. However, the Land Subdivision Regulations provide as follows: ". . . and to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air."

This court has difficulty in following the defendant's argument that he was subjected to duress and imposition. The zoning regulation required providing for open spaces for parks and playgrounds and for recreation, light and air. Iannucci provided such an area when he submitted the original map in

1976 when the defendant was his partner. That same map was used for each presentation to the PZC including the last one in 1986, without any change. The defendant never said to the PZC he would not set aside such an area and he continued to provide at every opportunity . The Town counsel, when he insisted on the defendant providing a deed for that lot, was simply following the mandate of the subdivision regulations, which would enable the applicant to present an acceptable application. The defendant was never told he must deed the lot, he was told it was a requirement of the subdivision regulations. It was the defendant's statement that he was under duress "because I had to give up something," however he admits he asked no official about open spaces because it was in the regulations. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." Smedley Co. v. Landsing, 35 Conn. Supp. 578, 580. The town attorney honestly believed the PZC was entitled to receive the open space by virtue of the subdivision regulations and that belief was reasonable and therefore his conduct was not wrongful and did not constitute duress. See Crittenden v. Royce, 100 Conn. 617. "It is inherent in duress that the acts or threats, claimed to constitute, it should be wrongful. Restatement Contracts, Vol 2, Sec. 492, Par. (g), p.941." Werner v. Minor, 124 Conn. 92, 95. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." Werner v. Minor, supra, 95. The defendant has failed to demonstrate duress by a preponderance of the evidence, or by any other degree of evidence.

The next issue raised by the defendant is that the regulation is unconstitutional in that it did not substantiate a legitimate town interest. The defendant first states that the regulations' constitutionality does not have to be considered since the taking was outside the scope of Sec. 3.4 which only allowed a taking of open spaces for parks and playgrounds and not to provide a vacant lot. The PZC regulations must be read as a whole and include the statement preceding Sec. 3.4 to the effect that they are to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air. While the lot has had no altercations

or improvements to it since 1986, it could, if and when the need develops, become a park or playground. Just leaving it undeveloped does not mean that it could not at the appropriate point be developed into a park or playground. In addition, as it exits now, it provides light and air, two of the purposes of the regulations. The defendant claims that Nollan v. California Coastal Comm., 483 U.S. 825, 841, is controlling, wherein the court stated: "our cases describe the condition for abridgement of property rights through the police power as a substantial advancing of a legitimate state interest." That case differs from the instant case in that the Commission made the issuance of a building permit conditional on a public easement for passage of the public to the beach. This restriction is applicable to all of the landowners' land i.e. the open space and is a restriction created specially for this piece of property and not of all property owners. The instant case concerns one lot out of eleven and the restriction is applied equally to every subdivision of more than ten acres or ten lots in the town, and in accordance with Nollan, it substantially advances a legitimate state and town interest, declared in Sec. 8-23 Connecticut General Statutes entitled "PLAN OF DEVELOPMENT" and Sec.8-25 Connecticut General Statutes "Subdivision of Land" which provides for open spaces, parks and playgrounds. Aunt Hack Ridge Estates, Inc. v. Planning Commission, 160 Conn. 109 held that a similar regulation requring the land be set aside for open spaces, parks and playgrounds was valid and constitutional exercises of the police power of the town and the state statutes. "The party challenging a statute's constitutionality has a heavy burden of proof. The unconstitutionality must be proven beyond all reasonable doubt." Bottone v. Westport, 209 Conn. 652, 657. "If the ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." Russo v. East Hartford, 179 Conn. 250, 258. " We have held that a commission's power to regulate the use of land, where reasonable and important, does not constitute a taking of property without due process of law or just compensation. . . .Where the free exercise of one's rights of property is detrimental to the public interest, the State has the right to regulate reasonably such exercise of control under the police power. . . .One who chooses to engage in subdividing land by that decision thus chooses also to be subject to the reasonable regulation of the local planning commission."

Whittaker v. Zoning Board of Appeals, 179 Conn. 650. The unconstitutionality of the PZC's zoning regulations with respect to the requirement for open spaces, parks and playgrounds has not been proven beyond all reaonable doubt. The lot is a "passive park", i.e., it is set aside for that purpose and can be utilized at any point. The "Plan of Development" of Monroe provides in Sec. 6. . . "Recreation and Open Space, Opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well being of the community." That section sets as policy that open space be within a reasonable distance of all residents' homes, and that recreational facilities and programs should be available; and that the town adopt a schedule of open space acquisition providing for all types of activities. It therefore serves legitimate governmental purposes and substanitally advances legitimate state and town interests, both which are described in the state statutes in Sec.8-23 and Sec.8-25 of the Connecticut General Statutes and the PLA Regulations, and which are a valid exercise of the town's police powers. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365; Agins v. City of Tiburon, 447 U.S. 259, 261 n.8.

Because of the rulings herein before made, it is not necessary to discuss the defendant's claim of a constructive trust of the lot and the remedy therefore.

Query as to whether the defendant's counterclaim is legally involved in this case since, while the counterclaim arises out of the same subdivision, the complaint involves two lots of the subdivision on which taxes are due and owing and the counterclaim involves a third lot which was deeded for open space. It would appear that the complaint and counterclaim do not arise out of the same transaction, nor do they arise out of any transaction which is the subject of the plaintiff's complaint.

Judgment may enter for the plaintiff on the complaint granting a strict foreclosure on the premises known as 2 Fairlea Drive for the tax liens for October 1, 1986, 1987, 1988, 1989, and 1990. The total debt due thereon is found to be $14,861.25 which includes interest and fees as of August 2, 1993. The value of the premises is found to be

$85,000.00. The law day for the defendant landowner is set as February 8, 1994, for the encumbrancer Federal Deposit Insurance Corporation as Feruary 10, 1994, and for the encumbrancer New England Building Products, Inc. February 9, 1994. A strict foreclosure on 36 Fairlea Drive may enter for the tax liens of October 1, 1986, 1987, 1988, 1989 and 1990. The total debt found to be due thereon is found to be $13,235.28 as of August 2, 1993, including interest and fees. The value of the premises are found to be $95,000.00. The law day for defendant landowner is set as February 8, 1994, for the encumbrancer New England Building Product, Inc. February 9, 1994, and for the defendant the Gateway Bank the date of February 10, 1994,on its mortgage dated October 24, 1990; February 11, 1994 on its mortgage dated July 21, 1989 and February 12, 1994 on its mortgage dated October 24, 1988.

Judgment may enter for the plaintiff on the Counterclaim and Set Off together with costs. The plaintiff is further entitled to recover interest from August 2, 1993 to the day of redemption.

Levine
LEVINE, STATE TRIAL REFEREE

6. ORDER OF THE APPELLATE COURT OF CONNECTICUT DENYING REQUEST TO POSTPONE ORAL ARGUMENT

NO. A.C. 12922 : APPELLATE COURT

TOWN OF MONROE: STATE OF CONNECTICUT

VS.
JOHN C. MANDANICI : APRIL 21, 1994

ORDER

THE MOTION OF THE DEFENDANT-APPELLANT, FILED APRIL 21, 1994, TO POSTPONE ORAL ARGUMENT,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED

BY THE COURT,

Alan M. Ganusscio
ASSISTANT CLERK-
APPELLATE

No. 94-1207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.,
Petitioner,

v.

TOWN OF MONROE,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is this action barred for lack of subject matter jurisdiction by virtue of Petitioner's failure to raise his constitutional claim at the time of the subdivision application approval process as opposed to this collateral attack instituted six years after the open space requirement was allegedly imposed?

2. Did the Superior Court of the State of Connecticut, and thereafter the Appellate Court of the State of Connecticut, err in holding and affirming, respectively, that Respondent did not violate the constitutional prohibition against taking private property without just compensation as a result of Petitioner's decision to deed to Respondent ten percent of his subdivision in accordance with Respondent's zoning regulations and municipal plan?

3. Did the Superior Court of the State of Connecticut, and thereafter the Appellate Court of the State of Connecticut, err by concluding that it was Petitioner rather than Respondent who bore the burden of proof on the issue of demonstrating a violation of the constitutional prohibition against taking property without just compensation where Petitioner never contested the open space requirement at the hearing on his subdivision application, never appealed the subdivision application insofar as it imposed an open space requirement, filed this counterclaim alleging a constructive trust, and never raised the issue of who bore the burden of proof either at trial or on appeal to the Appellate Court? Even if the burden was misplaced, was sufficient proof introduced by Respondent to satisfy the appropriate standard?

LIST OF PARTIES

Respondent is satisfied with Petitioner's representation as to the parties.

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IN THE

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OCTOBER TERM, 1994

No. 94-1207

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v.

TOWN OF MONROE,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Connecticut

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RESPONDENT'S BRIEF IN OPPOSITION

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

Respondent is satisfied with Petitioner's entry as to the official and unofficial reports of this case as reported below.

STATEMENT OF THE GROUNDS OF JURISDICTION

Respondent is satisfied with Petitioner's statement of the grounds for jurisdiction.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The following constitutional, statutory and regulatory provisions are in issue in this case:

1. The Fifth Amendment to the United States Constitution states:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution states, in relevant part:

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Connecticut General Statutes Section 8-8(a) (1989) provides, in relevant part: [1]

   Any person or persons severally or jointly aggrieved by any decision of said board . . . may, within fiteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such mu-

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[1] The full text of Connecticut General Statutes Section 8-8 is reproduced in the Appendix (hereinafter designated as "A") at 1a.

nicipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court.

4. Connecticut General Statutes Section 8-23 (1989) states, in relevant part: [2]

> The commission shall prepare, adopt and amend a plan of development for the municipality. . . . The plan of development shall be a statement of policies, goals and standards for the physical and economic development of the municipality. . . . The plan shall be designed to promote with the greatest efficiency and economy the coordinated development of the municipality and the general welfare and prosperity of its people.

5. Connecticut General Statutes Section 8-25(a) (1989) provides, in relevant part: [3]

> No subdivision of land shall be made until a plan for such subdivision has been approved by the commission. . . . Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land. . . . Such regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan.

6. Connecticut General Statutes Section 8-26 (1989) provides, in relevant part: [4]

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[2] The full text of Connecticut General Statutes Section 8-23 is reproduced at A at 4a.

[3] The full text of Connecticut General Statutes Section 8-25 is reproduced at A at 6a.

[4] The full text of Connecticut General Statutes Section 8-26 is reproduced at A at 10a.

All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the commission with an application in the form to be prescribed by it. The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations.

7. Connecticut General Statutes Section 8-28(a) (1989) provides, in relevant part: [5]

   Except as provided in section 8-30, any person aggrieved by an official action or decision of a planning commission, including a decision to take no action, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies.

8. Town of Monroe Subdivision Regulations 3.4 provides: [6]

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[5] The full text of Connecticut General Statutes Section 8-28 is reproduced at A at 12a.

[6] The full text of the Town of Monroe Subdivision Regulations 3.4 is reproduced at A at 17a..

Open Spaces: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.

The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

9. Town of Monroe Land Subdivision Regulations Preamble provides: [7]

In accordance with the provisions of Chapter 126 of the 1958 Revision of the General Statutes of the State of Connecticut, as amended, the Town Planning and Zoning Commission of the Town of Monroe, Connecticut, hereby adopts the following regulations as the Land Subdivision Regulations of the Town of Monroe. All prior regulations are hereby rescinded. These regulations apply to all land within the Town of Monroe. The purpose of these regulations is to provide that the land to be subdivided shall be of such

[7] The full text of the Town of Monroe Subdivision Regulations Preamble is reproduced at A at 15a.

character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewage and, that the proper provision shall be made for protective flood control measures, and that the proposed streets are in harmony with existing or proposed principal thoroughfares in said town, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width as to provide an adequate and convenient system for present and prospective traffic needs and fire safety, and to provide for open spaces for parks and playgrounds, for open spaces, for recreation, light and air.

STATEMENT OF THE CASE

The genesis of this action lies in two separate tax foreclosures filed by Respondent against Petitioner for back taxes owed by Petitioner. See Memorandum of Decision at 1, reproduced at A at 18a. Those tax foreclosures were later consolidated for purposes of trial and decision. *Id.* at 19a. The factual and legal issues concerning the tax foreclosures were stipulated to by the parties and are not at issue here. *Id.*

What is in issue concerns Petitioner's counterclaim in the consolidated action. Petitioner claimed that as the owner of a proposed ten-lot subdivision in the Town of Monroe, Connecticut (hereinafter "Town"), he was forced by duress and imposition to deed over to the Town 1.26 acres of that subdivision in order to secure the Town's approval for the subdivision. Respondent denied the basis of Petitioner's claim both factually and legally. The trial court, after full hearing and briefing by the parties, found in favor of Respondent on the counterclaim.

In 1977, Petitioner's partner, Lawrence Iannucci,[8] submitted a subdivision map to the Town Planning and Zon-

[8] Since Petitioner is bound by the actions of his partner, all actions taken by one or the other are attributed to Petitioner.

ing Commission for the Town of Monroe. *Id.* at 21a. The subdivision was for eleven lots, each of which was at least one acre. *Id.*

The map submitted by Petitioner specifically designated 1.26 acres as open space. *Id.* at 20a. This designation was consistent with Section 3.4 of the Monroe Land Subdivision Regulations (1976).

The submission of the parcel for open space by Petitioner was neither requested nor suggested by the Town. *Id.* It was done at Petitioner's offering, although presumably in response to the subdivision regulations. *Id.* at 21a.[9]

The open space designated by Petitioner represented approximately ten percent of the development. *Id.* That designation was consistent with Respondent's practice of requiring all developers of subdivisions of ten or more lots

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[9] Interestingly, Petitioner's proof on this issue was less than clear. His representative testified that the land chosen was designated "in order to give [the Town] as much as you could to get the Town's approval so the Town would like it. And the more you give . . . the Town, the more likely they are to approve the subdivision." (Testimony of Frank Mandanici, July 15, 1993). Petitioner has variously characterized this decision to give the land as "a normal expected business cost" (Defendant's Reply and Supplemental Brief, dated August 13, 1993, at 10, excerpt reproduced at A at 29a), as something that was "close to being a voluntary act in 1977 of offering the land in exchange for quick approval . . ." *Id.* at 11, excerpt reproduced at A at 30a), and as a means of getting "into the 'good graces' of the Plaintiff." (Defendant's Brief to Appellate Court, at 6, excerpt reproduced at A at 27a). Petitioner, however, apparently changed his mind sometime during the decade while his applications were pending. He asserts it "was no longer a voluntary act in 1986 when the land was deeded to the Town because the Court costs and cost of the delay of 9 years had caused a great loss in the project's profits and a donation of a $50,000 piece of land now took on much greater significance." (Defendant's Reply and Supplemental Brief, dated August 13, 1993 at 10, excerpt reproduced at A at 29a.) As noted *infra*, however, Petitioner never bothered to tell Respondent about this change of heart.

or of subdivisions of ten or more acres to dedicate approximately ten percent of the land as open space. *Id.* The land dedicated here was a non-conforming lot because of inadequate road frontage. *Id.* Petitioner could not have built on the non-conforming lot unless he obtained a zoning variance, which he never sought. *Id.*

Notwithstanding Petitioner's claim that the designated lot was provided in response to the duress and imposition imposed by the Town, the trial court held that not to be the case. *Id.* Rather, the trial court found that the designation had been made voluntarily both in the original map submitted in connection with Petitioner's first application in 1976 and in connection with the three resubmissions filed thereafter, including the fourth application which was approved in 1986. At no time during the entire ten-year period between 1976 and 1986 did Petitioner ever question the designation or object to designating the lot as open space. *Id.* In fact, this issue does not appear to have been discussed during the entire decade Petitioner's applications were under consideration.

The trial court further held that after the subdivision had been approved, the Town requested the deed through its attorney. *Id.* at 22a. Even then, the court stated, there was no duress or imposition. The Town Attorney was simply following the mandate of the regulations and requiring Petitioner to do that which his representative voluntarily said he would do before the Planning and Zoning Commission. *Id.* In short, there was no duress or imposition; there was simply Petitioner's offer of open space and Respondent's acceptance.

Petitioner asserted below that the regulation itself was unconstitutional because it did not substantially advance a legitimate town interest. He relied, in part, on the fact that the Town had not developed the deeded area into a park or playground. The trial court found no support in that argument. Turning to the Preamble and to Section 3.4 of the Subdivision Regulations, it noted that the Town

had specifically provided for open space requirements to satisfy the Town's salutary objective of providing parks and playgrounds, recreation, light and air for its residents. *Id.* at 22a.

The trial court specifically found that at least two of these provisions, light and air, were immediately met by virtue of the space having been deeded to the Town. *Id.* It further found that if and when the Town developed the space as a park or playground, the remaining objectives would be accomplished. *Id.* In fact, it intimated that the designated lot was, in essence, a passive park consistent, in fact, with the Town's "Plan of Development" which provided that it must look to and encourage "opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area [as] essential to the continued health and economic well-being of the community." *Id.* at 24a, quoting Monroe Plan of Development, at the section entitled Recreation and Open Space which section is reproduced at A at 31a. The court, therefore, held that the Town's legitimate state interests were substantially advanced through this regulation.[10]

On appeal, the Connecticut Appellate Court affirmed the trial court's judgment entered on behalf of Respondent by a decision issued on May 24, 1994. Thereafter, Petitioner filed a Motion for Reargument and Reconsideration, which motion was denied by the court on June 22, 1994. Thereafter, Petitioner filed a Motion for Reargument *En Banc*, which motion was denied on June 22, 1994. Thereafter, Petitioner filed a petition for certification to appeal

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[10] It should be noted that Connecticut authority regarding unconstitutional takings in situations like this are in accord with *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). *See Property Group, Inc. v. Planning and Zoning Comm'n*, 226 Conn. 684, 698, 628 A.2d 1277, 1284 (1993). (There must be "substantial evidence demonstrating" that the condition in issue "meet[s] the requirements of the [zoning regulations]" which, in turn, embody legitimate governmental interests.)

to the Supreme Court for the State of Connecticut, which petition was denied on October 13, 1994. Thereafter, this petition followed.[11]

SUMMARY OF ARGUMENT

Petitioner's claim in this matter is made solely on the basis of the Fifth and Fourteenth Amendments' provisions concerning takings without just compensation, in accordance with this Court's decision in *Dolan v. The City of Tigard*, 512 U.S. ——, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), and its predecessor *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).[12] He further asserts that because the Town's action was unconstitutional, it must be deemed to be holding the property in constructive trust which must now be returned along with money damages. Respondent respectfully submits that Petitioner's argument is both factually and legally insupportable.[13]

A. Petitioner's Action Is Barred for Lack of Subject Matter Jurisdiction.

Respondent's first argument is that this Court lacks subject matter jurisdiction because Petitioner failed to raise his constitutional claim as part of the administrative appeals process in Connecticut which governs subdivision applications. Petitioner's collateral attack of the land dedication requirement via the counterclaim filed in this action is not in accord with *Upjohn Co. v. Planning and Zoning Comm'n*, 224 Conn. 96, 616 A.2d 793 (1992) and its progeny and the administrative procedure set forth

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[11] Petitioner has reproduced these pleadings and orders in his appendix. They are not reproduced here.

[12] Petitioner has not advanced in this petition any claim that the Constitution for the State of Connecticut has been violated.

[13] As noted, Petitioner has also made a passing argument that the trial court improperly placed the burden on him to prove the unconstitutionality of Respondent's conduct. Respondent has addressed that issue, as well.

in Connecticut General Statutes Section 8-28. Petitioner's challenge, if it were to be made at all, should have been made by way of appeal of the subdivision application approval insofar as it required a land dedication. Having failed to exercise that remedy, the Court is without subject matter jurisdiction to consider Petitioner's claim by way of collateral attack.

B. No Unconstitutional Taking Occurred in This Case.

Respondent's second argument is that neither *Nollan* nor *Dolan*, nor any other decision of this Court, requires a reversal of the decisions of the Connecticut Appellate and Superior Courts. In fact, *Nollan* and *Dolan* are inapposite to the pending appeal, both factually and legally.

First, Petitioner has not shown that his decision to dedicate the land was motivated by duress or imposition. Each of the four applications submitted by Petitioner between 1976 and 1986 contained the open space dedication. The trial court specifically found there was no duress or imposition, but simply a decision by Petitioner to voluntarily comply with a regulation for subdivisions of this nature. The trial court further found that at no point did Petitioner ever object to, challenge or refute the existence of the open space requirement. Thus without a factual prerequisite of duress or imposition having been demonstrated, this case is distinguishable from *Nollan, Dolan*, and their progeny.

Second, *Nollan* and *Dolan* are not controlling because the property deeded voluntarily by Petitioner substantially advanced a legitimate town interest and effectuated a substantial governmental purpose. The land dedication not only satisfied an immediate need of light and air, but also served as a passive park, which, if the Town so desired, could be developed into a park or playground.

Further, in addressing the second requirement of *Nollan*, the trial court found an essential nexus meeting the *Dolan*

"rough proportionality test" between the requirement of open space in the Town and the reason for that requirement. In subdivisions of more than ten lots or greater than ten acres, the Town's policy was to require a ten percent dedication. This percentage represented the proper allocation of space to meet the Town's desire to accommodate its ecological concerns as well as its need for light, air and possibly parks or playgrounds. The requirement was consistent with the Town's authority to grant or deny development plans as being consistent with the Town Plan. It is particularly applicable here inasmuch as the land in issue was a nonconforming lot, offered by Petitioner, which could not be approved for building unless a variance was sought.

C. The Burden of Proof Was Properly Assigned to Petitioner Given the Facts of This Case and, Even if It Were Not, Respondent Introduced Sufficient Evidence to Meet Its Burden.

Petitioner argues that *Dolan* places the burden of proof of satisfying the *Nollan/Dolan* test of constitutionality on the governmental entity. *Dolan* so holds. But, Petitioner never objected to the trial court's assignment of the burden of proof, and failed to raise the claim to the Appellate Court.

This case involves a claim that the Town holds the property in constructive trust on behalf of Petitioner; it is not a direct appeal of a municipal act as was involved in *Nollan* and *Dolan*. Petitioner chose to ignore that route and pursue his constructive trust theory for which he properly bears the burden of proof, particularly since he voluntarily chose to deed this property to the Town as far back as 1977 when he submitted his first application.

Furthermore, even if the court below erred in misassigning the burden of proof, Respondent introduced sufficient evidence to meet the *Dolan* "rough proportionality" test.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S ACTION IS BARRED FOR LACK OF SUBJECT MATTER JURISDICTION.

Petitioner's counterclaim in issue here was filed on June 26, 1992, more than fifteen years after Petitioner first submitted his subdivision application for zoning approval. In that first application, and without any request from the Town, Petitioner set aside ten perecnt of the property from that subdivision and reflected that set-aside on his map. The subdivision application was denied and appealed on three separate and successive occasions over the next decade. Each time the application was resubmitted, the ten percent set-aside was voluntarily included by Petitioner. At no time was Petitioner ever requested by the Town to reflect that set-aside on his map. In fact, the set-aside was never discussed until 1986, after the fourth application had been approved, when Respondent's agent requested a deed conveying the property to the Town. Even then, however, Petitioner did not challenge the act by any legal recourse, written objection or verbal challenge. In fact, Petitioner did not ever challenge the conveyance until it filed a counterclaim in 1992 in response to the Town's tax foreclosure.[14]

Petitioner has been quick to point out in his brief that Respondent has not made a laches defense in response to the claim of constructive trust. He is correct. However, that decision in no way impacts upon the infirmity of Petitioner's claim.

Petitioner never appealed the final decision granting his subdivision application which provided for the open space and with which he voluntarily complied. By failing

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[14] Furthermore, the record also is devoid of any mention by Petitioner that he ever appeared at any hearing or any Commission meeting in opposition to the Plan of Development which provided for open space or in response to the adoption of Zoning Regulations which provided for open space allocations in conjunction with subdivisions.

to exercise that remedy, he has waived his right to seek relief through this alternative.

In Connecticut, the rule is absolutely clear that all claims pertaining to a subdivision application granted or denied must be litigated as part of an administrative appeal. Under Connecticut General Statutes Section 8-28, a party aggrieved by the action of a planning and zoning commission in connection with a subdivision has the right to file an administrative appeal of such conduct. It is the only right. An aggrieved party may not collaterally attack a municipal act for which it has a statutory right to institute an administrative appeal. *Upjohn Co. v. Zoning Board of Appeals*, 224 Conn. 96, 102, 616 A.2d 793, 796 (1992) (construing parallel statutes, Conn. Gen. Stat. Section 8-8); *Butzgy v. Town of Glastonbury*, 203 Conn. 109, 122, 523 A.2d 1258, 1265 (1987) (construing Conn. Gen. Stat. Section 8-28). As stated by the Supreme Court of Connecticut, "[w]hen a party has a statutory right of appeal from the decision of an administrative agency, he may not, instead of appealing, bring an independent action to test the very issue which the appeal was designed to test." *Carpenter v. Planning and Zoning Comm'n*, 176 Conn. 581, 598, 409 A.2d 1029, 1037 (1979). This rule, "rest[s] in large part, at least in the zoning context, on the need for stability in land use planning and the need for justified reliance by all interested parties. . . ." *Upjohn Co.*, 224 Conn. at 102, 616 A.2d at 796. *Accord Spectrum of Conn., Inc. v. Planning and Zoning Comm'n*, 13 Conn. App. 159, 163, 535 A.2d 382, 384 (1988) *cert. denied*, 207 Conn. 804, 540 A.2d 373 (1988).

In the absence of a proper appeal under Connecticut General Statutes Section 8-28, the court has no subject matter jurisdiction. *Upjohn Co.*, 224 Conn. at 104, 616 A.2d at 797; *Butzgy*, 203 Conn. at 114 and 116, 523 A.2d at 1261 and 1262 (finding no jurisdiction to entertain collateral attack of zoning permits made subject to a condition which the applicant initially accepted but then

challenged three years later by way of collateral attack).[15] Simply stated, Petitioner's claim is barred because of his failure to raise it as part of the 1986 subdivision approval which was conditioned upon the land dedication.

In this regard the Court may take guidance from Justice Souter's opinion in *Town of Auburn v. McEvoy*, 553 A.2d 317 (1988) when he sat as a member of the New Hampshire Supreme Court. In that case, the court was confronted with a challenge to an open space requirement brought by a property owner requesting the return of a subdivision lot. The action was filed subsequent to the New Hampshire Supreme Court's decision in *J.E.D. Assoc's, Inc. v. Town of Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981), which held that the open space requirement in issue there was unconstitutional.

In *McEvoy*, the applicant went through the approval process without contesting the deed requirement. She then resurrected the issue subsequent to the *J.E.D. Assoc's* opinion by way of a declaratory judgment action. The trial court found in favor of the town on the basis of laches. On appeal, the town argued that the trial court not only correctly upheld its laches defense but also asserted that it was entitled to relief based on the fact that the applicant had failed to exhaust her administrative remedies.

The Supreme Court of New Hampshire held that "[b]y providing that any appeal from a planning board's decision or order must be brought within the thirty-day period, the legislature obviously expressed an intent to endue such an order with finality, at least insofar as the order applies a town's land use regulations in the particular instance." *McEvoy*, 553 A.2d at 319. Going further, it stated "[s]uffice it to say here . . . that the statutory

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[15] Subject matter jurisdiction is properly raised at any point in the litigation, including on appeal. *Park City Hosp. v. Comm'n on Hosp's. and Health Care*, 210 Conn. 697, 703, 556 A.2d 602, 605 (1989).

limitation on the availability of an appellate remedy will be rendered nugatory unless the failure to bring a timely appeal is held to bar a dissatisfied party from mounting a later attack on the order in question." *Id.* *See also Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991); *Xenia Rural Water Ass'n v. Dallas County*, 445 N.W. 2d 785, 788-89 (Iowa 1989). It overruled its holding in *J.E.D. Assoc's* which permitted a declaratory judgment action to be filed claiming an unconstitutional taking, separate and apart from an administrative appeal, and concluded that in the absence of an agreement to raise the constitutional claim at some later date or evidence of some written indication that the claim would be preserved by further litigation, there is no right to raise a separate claim. *See Town of Auburn v. McEvoy*, 553 A.2d at 321.[16]

II. NO UNCONSTITUTIONAL TAKING OCCURRED IN THIS CASE.

Nollan and *Dolan* and their progeny do not, as Petitioner argues, support his argument that the open space requirement in issue here was unconstitutional. This case is factually and legally distinguishable from those cases.

A. Current State of Law Concerning Unconstitutional Taking.

When confronted with a claim of unconstitutional taking, a court must determine whether the action at issue is a valid exercise of police power by the respective authority. *Nollan*, 483 U.S. at 836-37. Specifically, under *Nollan*, there must be an essential nexus between the condition imposed by the municipal regulation and the goal which is sought by the authority in imposing that conditon. *Id.* If that nexus does not exist, then the court must determine the use and value of the respective property

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[16] Even if this caveat of the *McEvoy* decision were controlling here, it is clear that Petitioner has not satisfied the exception.

for the purposes of determining just compensation. This case centers entirely on the first prong of the *Nollan* test.

The Supreme Court has "long recognized that [a] land-use regulation does not effect a taking if it 'substantially advance[s] a legitimate state interests' [sic] and does not 'den[y] an owner economically viable use of his land . . .'" *Nollan*, 483 U.S. at 834, quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court has recognized a wide-range of legitimate state interests which may be protected if the regulation in issue substantially advances that interest. *See Agins*, 447 U.S. at 260-262 (scenic zoning); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning).

Under *Nollan*, a municipal authority may condition the grant of a permit on the exercise of some legitimate police power, provided that the municipal authority could have denied the permit if the interest which was to be satisfied by the condition would have been a proper reason for denial. *Nollan*, 483 U.S. 836. *Nollan*, in fact, states that a municipal authority may even impose a requirement on a land owner to satisfy a state interest as part of a development permit, even though the imposition of that condition outside the permit process might have constituted a taking. *Id.* at 834.

Dolan addressed the issue left undecided in *Nollan*, to wit, what degree of connection must exist to satisfy the essential nexus test enunciated in *Nollan* between the exactions [imposed by the regulation] and the projected impact of the proposed development. *Dolan*, 129 L.Ed. 2d at 317. It adopted what it called the rough proportionality test. Speaking for the court, Chief Justice Rehnquist stated "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 320.

B. Connecticut's Regulatory and Subdivision Approval Processes.

In Connecticut, a town's authority to approve a subdivision is vested with the local planning and zoning commission. *See* Conn. Gen. Stat. § 8-26. *See also, Thoma v. Planning and Zoning Comm'n*, 31 Conn. App. 643, 647, 626 A.2d 809, 811 (1993), *cert. granted in part* 227 Conn. 910 (1993). To fulfill its duty, a planning and zoning commission must examine the application and ensure that it conforms to the regulations which govern the awarding of subdivision approvals. *See Reed v. Planning and Zoning Comm'n*, 208 Conn. 431, 433, 544 A.2d 1213, 1214, (1988). A commission which finds that a proposed subdivision does not conform with the applicable zoning regulations may either deny the application or impose certain conditions upon its approval. *Timber Trails Corp. v. Planning & Zoning Comm'n*, 222 Conn. 380, 388, 610 A.2d 620, 624 (1992).

Under Connecticut General Statutes Section 8-23, a town is also vested with the authority to prepare a "plan of development for the municipality." *See Conn. Gen. Stat.* § 8-23. The municipal plan contemplated by Section 8-23 is of broader significance than the zoning regulations. *See Forest Constr. Co. v. Planning and Zoning Comm'n*, 155 Conn. 669, 677, 236 A.2d 917, 922 (1967). "Municipal planning is designed to promote, with the greatest efficiency and economy, the coordinated development of the municipality and the general welfare and prosperity of its people. . . . Its aim is to secure the uniform and harmonious growth of villages, towns and cities." *Kiska v. Skrensky*, 145 Conn. 28, 32, 138 A.2d 523, 525 (1958). While the plan does not control a commission in the enactment of zoning regulations, it does act as an interpretive tool. *Smith v. Zoning Bd. of Appeals*, 227 Conn. 71, 88, 629 A.2d 1089, 1099 (1993); *Levinsky v. Zoning Comm'n*, 144 Conn. 117, 123, 127 A.2d 822, 826 (1956).

The Town, through its applicable municipal authorities, has passed land subdivision regulations. Section 3.4 of the Monroe Land Subdivision Regulations provides as follows:

> *Open Spaces*: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.
>
> The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

As Zoning Regulation 3.4 specifically provides, the reservation of land shall "conform to any Town Master Plan" and "the Commission in requiring the provision of open space shall consider the proper development of the Town . . . ." The Monroe Plan of Development formulated in accordance with Connecticut General Statutes Section 8-23 specifically provides for recreation and open space. In relevant part, that plan provides that "[o]pportunities for passive and active recreation in locations accessible to residents, and preservation of the ecological balance and exhaustible natural resources of the area are

essential to continued health and economic well-being of the community." *See* Monroe Plan of Development at the section entitled Recreation and Open Space excerpt reproduced at A at 31a. Consistent with this general notion, the Town has set forth certain policies which are memoralized in its Plan of Development. The Town has decided that "[a] reasonable percentage of each subdivision should be permanently reserved for open space." *Id.* This "open space should be within [a] reasonable distance of all resident's [sic] homes and major centers of employment." *Id.* And, "[t]he Town should adopt a schedule of open space acquisition, preserving outstanding features, such as brooks and streams, providing for activities such as walking, skating, bicycling and riding, and reserving land topographically unsuited for intensive development." *Id.*

C. Applicability of Facts to Law.

Petitioner came to the Town with an application to convert virgin property into a ten-lot subdivision, thereby presenting the very real scenario that the ecological and aesthetic nature of that property would be changed dramatically and that the population density for that area and the concurrent drain on municipal resources would be increased by as many as ten families. In each of his four applications he filed with the planning and zoning commission, Petitioner filed a map depicting his planned subdivision and identified a single, nonconforming lot which Petitioner indicated would be deeded to Respondent. After the fourth application was approved in 1986, Petitioner voluntarily conveyed the nonconforming lot to Respondent. From 1976 through 1992, Petitioner never contested or challenged the land dedication issue. The open space requirement was, in every sense of the colloquialism, "a non-issue"—never challenged, never refuted, virtually never mentioned.[17]

[17] Indeed, as noted *supra* at note 9, the land dedication in the original application was not apparently made in response to Section

The open space was important because it satisfied the Town's interest of providing an aesthetic and ecological balance for the area (including the need for light and air) as well as providing area suitable for parks and recreation. In keeping with Section 3.4 and the Plan of Development, the land dedication provided the Town residents, including the purchasers of the individual lots in the subdivision, with the opportunity for "passive and active recreaton in a location accessible to residents" with the security of knowing that the "ecological balance and the exhaustible natural resources of the area, which were essential to the health and the economic well-being of the community" had been preserved. *See* Plan of Development at A at 31a.

Open space requirements are nothing new. In *Agins v. City of Tiburon*, 447 U.S. 259 (1980), this court upheld a municipal open space ordinance which restricted the development of certain land against an unconstitutional taking claim. In so doing, it noted the ordinance was grounded in the *City of Tiburon's* finding that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Agins*, 447 U.S. at 261 n.8. Connecticut has similarly recognized that open-space ordinances are constitutional. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 119, 273 A.2d 880, 886 (1970). *See* also R. Fuller, *Land Use Law and Practice*, at 188-89 (West 1993), citing *Aunt Hack Ridge Estates, Inc.*, 106 Conn. at 118, 273 A.2d at 995. ("A requirement that the developer dedicate open-space to the public is valid on the ground

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3.4 of the Monroe Zoning Subdivision Regulations but as an added incentive for the Town to approve the plan.

that the burden imposed on him is uniquely attributable to his own activity because the increase in population in the area which will result from that activity is productive of the need for open space.")

The open space dedication imposed upon Petitioner here was a condition which, in keeping with *Nollan*, had it not been satisfied, would have been a reason for denying a subdivision application. Under Connecticut General Statutes Section 8-25, "[n]o subdivision of land shall be made until a plan for such subdivision has been approved by the commission." Subdivision plans must conform with the Town's regulations, and the regulations shall provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan." Conn. Gen. Stat. § 8-25. Here, the Town could have denied the application if it had not provided for open space, parks and playgrounds consistent with the Town's regulations and municipal plan. Therefore, in keeping with *Nollan*, the Town cannot be faulted for imposing the open space requirement on Petitioner.

Petitioner's argument that the lack of any development of the open space property shows that no important governmental goal has been achieved by the dedication is hollow. The land dedication condition is a valid restriction based on a legitimate governmental interest. Even if the land is never developed into a playground or park, the goals and objectives of the zoning regulations and municipal plan have been satisfied. The aesthetic and ecological nature of the property has been preserved. (Testimony of Daniel Tuba, Respondent's Zoning Enforcement Officer, July 15, 1993) (The land in question had become a "significant wildlife habitat. It was all open space, well forested. There was significant visual value to it . . . .") It remains as a passive area for enjoyment of Town residents, including primarily those situated most closely to it.

As importantly, no law requires the Town to develop immediately the property into a park, playground or anything else. Indeed, the Town may decide that the open space is best left in its pristine state. It may also come to pass that if the Town is required to build on one of its existing parks (e.g., to provide for additional school space), then the Town may look to this property to develop as an alternative.[18]

The above analysis thus takes this case out of the *Nollan* and *Dolan* line. In *Nollan*, the court found that the restriction in issue did not satisfy the California Coastal Commission's purported desire of providing visual access to the beach behind the Nollans' property for passers-by. The court quite correctly read through the rhetoric employed by the Commission and found there was no substance to the notion that providing visual access to passers-by of the beach behind the Nollans' property would help people understand that there was public access to the beach at some other location. Lowering this psychological barrier, the court concluded, would not help remedy the deterrent to public use of the beach or any additional fear of congestion on the beach caused by the construction of the Nollans' new house. *Nollan*, 483 U.S. at 835.

Here, Respondent, consistent with Connecticut General Statutes Section 8-25, its regulations and its Plan of Development, required a developer who sought to turn raw acreage into a ten-lot subdivision, and who in turn would profit by the amenities the Town would provide to the families in these new homes, to set aside a small portion to satisfy the Town's interest in maintaining a proper esthetic and recreational balance. The open space requirement is directly related to this interest.

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[18] Part of the justification for open space requirements rests on the burden the subdivision imposes on the existing town amenities. *Aunt Hack Ridge Estates, Inc.*, 160 Conn. at 118, 273 at 885. If and when the town needs to enhance its amenities because of increased population, open space provides it with the basis to do so.

In *Dolan*, the court found that the City's desires to prevent flooding along the Fanno creek and reduce traffic congestion were legitimate public purposes for which a condition could be imposed. In *Dolan*, the community development code required a landowner to leave fifteen percent of his or her property as open space for the flood plain. Where the City in *Dolan* went wrong, however, was in failing to demonstrate why it was necessary to have the flood plain property converted to public property as opposed to private property. Further, the City made no demonstration of why a pathway easement was necessary to reduce congestion even though that was a legitimate state purpose.

In this case, unlike *Dolan*, Petitioner's subdivision would necessarily intensify the development area in which it is located by adding ten families. Those ten families would, in turn, drain the resources of the municipality by adding more people to the existing parks and recreational areas. The subdivision itself would detrimentally impact the ecological and aesthetic balance of the property in relation to other properties in the Town. It was therefore reasonable for the City to impose a ten percent requirement for open space.

Under *Dolan*, the Court is required to assess the ten percent open space requirement in light of the rough proportionality test enunciated in that decision. Mr. Tuba, the planning and zoning officer for the Town of Monroe, testified at trial that the approximate ten percent land dedication requirement is applied to all major subdivisions greater than ten acres or ten lots. (Testimony of Daniel Tuba, July 15, 1993.) In this case, the ten-acre set-aside consisted of a slightly greater than one acre lot which was non-conforming because of inadequate road frontage. The Town decided that the set-aside was roughly proportional and rationally related to its interest in providing open space for the Town residents, not only those located near that subdivision but also all other Town residents. Ob-

viously, as the court in *Dolan* stated, no exact number can be assessed. Certainly, when one is talking about a subdivision of greater than ten acres or ten lots, a ten percent set-aside bears a rough proportionality to the stated interest.[19]

III. THE BURDEN OF PROOF WAS PROPERLY ASSIGNED TO PETITIONER GIVEN THE FACTS OF THIS CASE AND, EVEN IF IT WERE LOST, RESPONDENT INTRODUCED SUFFICIENT EVIDENCE TO MEET ITS BURDEN.

Petitioner argues that *Dolan* imposes upon a municipality the burden of proof of showing a rough proportionality between the condition it imposes on an applicant and the legitimate governmental purpose which it seeks to accomplish. *Dolan* does indeed impose the burden on the Town under the facts of that case. Having said that, however, Petitioner is still not entitled to relief.

The standard of proof in *Nollan* and *Dolan* are inapposite to this case because of the nature of Petitioner's claim. In those cases, the aggrieved parties filed direct appeals of the unconstitutional conditions included in their permits. The burden of proof was shifted to the governmental authorities to show how they justified the conditions. Here, Petitioner never challenged the open space requirement as part of the application approval process. Indeed, he voluntarily chose which property he wanted to give to the Town, with absolutely no input by the Town. He chose the amount, the location and the configuration of the open space.

After indicating that he would give that land to the Town in four separate applications, after having given

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[19] Petitioner is hard-pressed to complain about this set-aside since it was he who in 1976 decided how much and which property he was going to give the Town. If it was Petitioner's decision in 1976 to offer this particular lot, how can he now challenge the Town's acceptance of it as being roughly proportional to the interest the Town was trying to advance?

that land without objection, and after waiting for six years to raise any claim, Petitioner, in effect, requested the return of the land as part of a constructive trust counterclaim filed in an unrelated tax foreclosure. Since he chose that route as opposed to simply challenging the application, he properly bears the burden of proof of demonstrating the elements of this claim, including showing that his conduct was motivated by imposition and duress. *Worobey v. Sibieth,* 136 Conn. 352, 356, 71 A.2d 80, 81 (1949); *Spatola v. Spatola,* 4 Conn. App. 79, 81, 492 A.2d 518, 519 (1985). He tried to do that by demonstrating that the zoning regulations amounted to extortion. He failed. He cannot look to *Dolan* to rescue him from the insufficiency of his proof. Neither *Dolan* nor any other decision of this Court holds in this context that a municipal authority, when confronted with a constructive trust claim, must offer evidence to show that its conduct was not unconstitutional such as to give rise to a duress and imposition claim. It simply is not the law.

Moreover, Petitioner never raised his claim about who properly bore the burden of proof in the trial court or appellate court. In essence, having proceeded to assume the burden in the trial court of demonstrating that there was no basis for the land dedication, he wants to have the trial repeated to impose the burden on the Town to show that there was. However, since he chose not to pursue the issue at trial, he cannot now be heard to complain.

Finally, there is no reason to retry this case simply to reassign the burden of proof even if it were proper for the Town to shoulder that burden. The Town offered more than sufficient proof to demonstrate the basis upon which it imposed the land dedication requirement and arrived at the rough proportionality of ten percent. It produced documentary proof both in the form of its zoning regulations and plan of development as well as the testimony of its zoning enforcement officer. In short, the Town's proof, whether it bore the burden or not, satisfies the *Nollan* and *Dolan* tests, to the extent that they apply at all.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONNECTICUT GENERAL STATUTES § 8-8

§ 8-8. Appeal from board to court. Review by appellate court

(a) Any person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court.

(b) Notice of such appeal shall be given by leaving a true and attested copy thereof with, or at the usual place of abode of, the chairman or clerk of said board, and by serving a true and attested copy upon the clerk of the municipality, provided service upon the clerk of the municipality shall be for the purpose of providing additional notice of such appeal to said board and shall not thereby make such clerk a necessary party to such appeal. The appeal shall state the reasons upon which it has been predicated and shall not stay proceedings upon the decision appealed from, but the court to which such appeal is returnable may, on application, on notice of the board and on cause shown, grant a restraining order.

(c) The authority issuing a citation in such appeal shall take from the appellant, unless such appellant is an official of the municipality, a bond or recognizance to said board, with surety, to prosecute such appeal to effect and

comply with the orders and decrees of the court. Said board shall be required to return either the original papers acted upon by it and constituting the record of the case appealed from, or certified copies thereof and a copy of the transcript of the stenographic or sound recording prepared in accordance with section 8-7a.

(d) The court, upon the motion of the person who applied for the board's decision, shall make such person a party defendant in the appeal. Such defendant may, at any time after the return date of such appeal, make a motion to dismiss the appeal. At the hearing on such motion to dismiss, each appellant shall have the burden of proving his standing to bring the appeal. The court may, upon the record, grant or deny the motion. The court's order on such motion shall be a final judgment for the purpose of the appeal as to each such defendant. No appeal may be taken from any such order except within seven days of the entry of such order.

(e) The court, upon an appeal taken under subsection (a) of this section, shall review the proceedings of said board and shall allow any party to such appeal to introduce evidence in addition to the contents of the record of the case returned by said board if the record does not contain a complete transcript of the entire proceedings before said board, including all evidence presented to it, pursuant to section 8-7a, or if, upon the hearing upon such appeal, it appears to the court that additional testimony is necessary for the equitable disposition of the appeal. The court may take such evidence or appoint a referee or committee to take such evidence as it directs and report the same to the court, with his or its findings of fact and conclusions of law, which report shall constitute a part of the proceedings upon which the determination of the court shall be made.

(f) The court, upon an appeal taken under subsection (a) of this section and after a hearing thereon, may reverse or affirm, wholly or partly, or may modify or revise

the decision appealed from. Costs shall be allowed against said board if the decision appealed from is reversed, affirmed in part, modified or revised. Appeals from decisions of said board shall be privileged cases to be heard by the court, unless cause is shown to the contrary, as soon after the return day as is practicable.

(g) There shall be no right to further review except to the appellate court by certification for review, upon the vote of two judges of the appellate court so to certify and under such other rules as the judges of the appellate court establish. The procedure on such appeal to the appellate court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the superior court unless modified by rule of the judges of the appellate court.

(h) No appeal taken under subsection (a) of this section shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the superior court and such court has approved such proposed withdrawal or settlement.

(1949 Rev., § 844; 1951, Supp. § 160b; 1955, Supp. § 379d; 1959, P.A. 460, § 2; 1963, P.A. 45; 1965, Feb. Sp. Sess., P.A. 622, § 3; 1967, P.A. 348; 1967, P.A. 712; 1971, P.A. 870, § 9, eff. Sept. 1, 1971; 1974, P.A. 74-183, § 179, eff. Dec. 31, 1974; 1976, P.A. 76-436, § 158, eff. July 1, 1978; 1977, P.A. 77-470; 1978, P.A. 78-280, § 1, eff. July 1, 1978; 1981, P.A. 81-165; 1983, June Sp. Sess., P.A. 83-29, § 13; eff. July 1, 1983; 1984, P.A. 84-227, § 1; 1985, P.A. 85-284, § 3, eff. Oct. 1, 1985; 1986, P.A. 86-236, § 2, eff. Oct. 1, 1986; 1988, P.A. 88-79, § 1, eff. April 20, 1988.)

CONNECTICUT GENERAL STATUTES § 8-23

§ 8-23. Plan of development

The commission shall prepare, adopt and amend a plan of development for the municipality. Such plan shall show the commission's recommendation for the most desirable use of land within the municipality for residential, recreational, commercial, industrial and other purposes and for the most desirable density of population in the several parts of the municipality. Such plan may also show the commission's recommendation for a system of principal thoroughfares, parkways, bridges, streets and other public ways; for airports, parks, playgrounds and other public grounds; for general location, relocation and improvement of public buildings; for the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, sewerage, light, power, transit and other purposes; and for the extent and location of public housing projects. Such other recommendations may be made by the commission and included in the plan as will, in its judgment, be beneficial to the municipality. The plan of development shall be a statement of policies, goals and standards for the physical and economic development of the municipality, and may include all necessary and related maps, explanatory material, photographs, charts or other pertinent data and information relative to the past, present and future trends of the municipality, and may include recommended programs for the implementation of the plan, including a schedule and budget for public capital projects, and a program for enactment and enforcement of zoning and subdivision controls, building and housing codes and safety regulations, plans for implementation of affordable housing and plans for open space acquisition. In preparing such plan the commission shall consider the community development action plan of the municipality, if any, the need for affordable housing and the protection of existing and potential public surface and ground drinking water supplies, and may consider phys-

ical, social, economic and governmental conditions and trends, including, but not limited to, local, regional and state studies of the human resource, education, health, housing, recreation, social services, public utilities, public protection, transportation and circulation, cultural and interpersonal communications needs of the municipality and the objectives of energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The plan shall be designed to promote with the greatest efficiency and economy the coordinated development of the municipality and the general welfare and prosperity of its people. The commission may prepare and adopt plans for the redevelopment and improvement of districts or neighborhoods which, in its judgment, contain special problems or show a trend toward lower land values. The commission may adopt the plan of development by a single resolution or may, by successive resolutions, adopt parts of the plan, whether geographical or functional, and amendments thereto. Prior to adopting the development plan or any part thereof or amendment thereto, the commission shall file in the office of the town clerk a copy of such plan or part thereof or amendment thereto but, in the case of a district commission, such commission shall file such information in the offices of both the district clerk and the town clerk, and shall hold at least one public hearing thereon, notice of the time and place of which shall be published in a newspaper having general circulation in the municipality at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days prior to the date of each such hearing, which notice shall make reference to the filing of such records in the office of the town clerk, or both the district clerk and the town clerk, as the case may be. Any plan or part thereof or amendment thereto shall, upon adoption by the commission, be filed in the office of the town clerk, but, if it is a district plan or amendment, it shall be filed in the offices of both

the district and town clerk, and shall become effective at a time established by the commission, provided notice thereof shall be published in a newspaper having general circulation in the municipality prior to such effective date. The commission shall review the plan of development at least once every ten years and shall adopt such amendments to the plan or parts of the plan, in accordance with the provisions of this section, as the commission deems necessary to update the plan.

(1949 Rev., § 856; 1959, P.A. 577, § 6; 1969, P.A. 477, § 1, eff. Oct. 1, 1972; 1971 P.A. 862, § 5, eff. Oct. 1, 1971; 1971, P.A. 862, § 6, eff. Oct. 1, 1972; 1973, P.A. 78-314, § 3; 1980, P.A. 80-327, § 2; 1985, P.A. 85-279, § 4; 1988, P.A. 88-13, § 1, eff. March 29, 1988.)

CONNECTICUT GENERAL STATUTES § 8-25

§ 8-25. Subdivision of land

(a) No subdivision of land shall be made until a plan for such subdivision has been approved by the commission. Any person, firm or corporation making any subdivision of land without the approval of the commission shall be fined not more than five hundred dollars for each lot sold or offered for sale or so subdivided. Any plan for subdivision shall, upon approval, or when taken as approved by reason of the failure of the commission to act, be filed or recorded by the applicant in the office of the town clerk within ninety days of the date such plan is delivered to the applicant, but, if it is a plan for subdivision wholly or partially within a district, it shall be filed in the offices of both the district clerk and the town clerk, and any plan not so filed or recorded within the prescribed time shall become null and void, except that the commission may extend the time for such filing for two additional periods of ninety days and the plan shall remain valid until the expiration of such extended time. All such plans shall be delivered to the applicant for filing or recording promptly after the time for taking an appeal from the

action of the commission has elapsed, and in the event of an appeal, promptly upon the termination of such appeal by dismissal, withdrawal or judgment in favor of the applicant. No such plan shall be recorded or filed by the town clerk or district clerk or other officer authorized to record or file plans until its approval has been endorsed thereon by the chairman or secretary of the commission, and the filing or recording of a subdivision plan without such approval shall be void. Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land. No such regulations shall become effective until after a public hearing, notice of the time, place and purpose of which shall be given by publication in a newspaper of general circulation in the municipality at least twice, at intervals of not less than two days, the first not more than fifteen days nor less than ten days, and the last not less than two days prior to the date of such hearing. Such regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewerage and, in areas contiguous to brooks, rivers or other bodies of water subject to flooding, including tidal flooding, that proper provision shall be made for protective flood control measures and that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the plan of development as described in section 8-23, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs. Such regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan. Such regulations, on and after July 1, 1985, shall provide that proper provision be made for soil erosion and sediment

control pursuant to section 22a-329. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to be occuppied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially different from conditions and requirements imposed on multi-family dwellings, lots containing multi-family dwellings, cluster developments or planned unit developments. The commission may also prescribe the extent to which and the manner in which streets shall be graded and improved and public utilities and services provided and, in lieu of the completion of such work and installations previous to the final approval of a plan, the commission may accept a bond in an amount and with surety and conditions satisfactory to it securing to the municipality the actual construction, maintenance and installation of such improvements and utilities within a period specified in the bond. Such regulations may provide, in lieu of the completion of the work and installations above referred to, previous to the final approval of a plan, for an assessment or other method whereby the municipality is put in an assured position to do such work and make such installations at the expense of the owners of the property within the subdivision. Such regulations may provide that in lieu of either the completion of the work or the furnishing of a bond as provided in this section, the commission may authorize the filing of a plan with a conditional approval endorsed thereon. Such approval shall be conditioned on (1) the actual construction, maintenance and installation

of any improvements or utilities prescribed by the commission or (2) the provision of a bond as provided in this section. Upon the occurrence of either of such events, the commission shall cause a final approval to be endorsed thereon in the manner provided by this section. Any such conditional approval shall lapse five years from the date it is granted, provided the applicant may apply for and the commission many, in its discretion, grant a renewal of such conditional approval for an additional period of five years at the end of any five-year period, except that the commission may, in its discretion, grant a renewal period of conditional approval or renewal of such approval. Any person, firm or corporation who, prior to such final approval, sells or offers for sale any lot subdivided pursuant to a conditional approval shall be fined not more than five hundred dollars for each lot sold or offered for sale.

(b) The regulations adopted under subsection (a) of this section shall also encourage energy-efficient patterns of delevolpment and land use, the use of solar and other renewable forms of energy, and energy conservation. The regulations shall require any person submitting a plan for a subdivision to the commission under subsection (a) of this section to demonstrate to the commission that he has considered, in developing the plan, using passive solar energy techniques which would not significantly increase the cost of the housing to the buyer, after tax credits, subsidies and exemptions. As used in this subsection and section 8-2, passive solar energy techniques mean site design techniques which maximize solar heat gain, minimize heat loss and provide thermal storage within a building during the heating season and minimize heat gain and provide for natural ventilation during the cooling season. The site design techniques shall include, but not be limited to: (1) House orientation; (2) street and lot layout; (3) vegetation; (4) natural and man-made topographical features; and (5) protection of solar access within the development.

(49 Rev., § 858; Nov., 1955, Supp. § N12; 1959, P.A. 577, § 7; 1959, P.A. 669; 1971, P.A. 196; 1971, P.A. 862, § 8, eff. Oct. 1, 1971; 1975, P.A. 75-131; 1977, P.A. 77-545, § 2; 1978, P.A. 78-104, § 5; 1978, P.A. 78-314, § 4; 1979, P.A. 79-301; 1981, P.A. 81-254; 1981, P.A. 81-334, § 1; 1983, P.A. 83-388, § 8, eff. July 1, 1985; 1985, P.A. 85-91, § 4, eff. May 1, 1985; 1988, P.A. 88-203, § 2; 1988, P.A. 88-263.)

CONNECTICUT GENERAL STATUTES § 8-26

§ 8-26. Approval of subdivision and resubdivision plans. Waiver of certain regulation requirements. Applications involving inland wetlands and watercourses

All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the commission with an application in the form to be prescribed by it. The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations. Such regulations may contain provisions whereby the commission may waive certain requirements under the regulations by a three-quarters vote of all the members of the commission in cases where conditions exist which affect the subject land and are not generally applicable to other land in the area, provided that the regulations shall specify the conditions under which a waiver may be considered and shall provide that no waiver shall be granted that would have a significant adverse effect on

adjacent property or on public health and safety. The commission shall state upon its records the reasons for which a waiver is granted in each case. The commission may charge fees for the processing of subdivision applications and inspection of subdivision improvements, the minimum fee to be fifty dollars for each application and the maximum to be twenty-five dollars for each lot within the planned subdivision. The commission may hold a public hearing regarding any subdivision proposal if, in its judgment, the specific circumstances require such action. No plan of resubdivision shall be acted upon by the commission without a public hearing. Notice of the public hearing shall be given by publication in a newspaper of general circulation in the municipality at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days prior to the date of such hearing, and by sending a copy thereof by registered or certified mail to the applicant. In addition to such notice, such commission may, by regulation, provide for notice by mail to persons who are owners of land which is adjacent to the land which is the subject of the hearing. The commission shall approve, modify and approve, or disapprove any subdivision or resubdivision application or maps and plans submitted therewith, including existing subdivisions or resubdivisions made in violation of this section, within the period of time permitted under section 8-26d. Notice of the decision of the commission shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to any person applying to the commission under this section, by its secretary or clerk, under his signature in any written, printed, typewritten or stamped form, within fifteen days after such decision has been rendered. Such notice shall be a simple statement that such application was approved, modified and approved or disapproved, together with the date of such action. The failure of the commission to act thereon shall be considered as an approval, and a cer-

tificate to that effect shall be issued by the commission on demand. The grounds for its action shall be stated in the records of the commission. No planning commission shall be required to consider an application for approval of a subdivision plan while another application for subdivision of the same or substantially the same parcel is pending before the commission. If an application involves land regulated as an inland wetland or watercourse under the provisions of chapter 440,[1] the applicant shall submit an application to the agency responsible for administration of the inland wetlands regulations no later than the day the application is filed for the subdivision or resubdivision. The commission shall not render a decision until the inland wetlands agency has submitted a report with its final decision to such commission. In making its decision the commission shall give due consideration to the report of the inland wetlands agency. The provisions of this section shall apply to any municipality which exercises planning power pursuant to any special act.

(1949 Rev., § 859; 1959, P.A. 679, § 6; 1963, P.A. 55, § 2; 1963, P.A. 273, § 1; 1965, Feb.Sp.Sess., P.A., 622, § 5; 1967, P.A. 884, § 2; 1971, P.A. 862, § 9, eff. Oct. 1, 1971; 1973, P.A. 73-550; 1975, P.A. 75-40; 1977, P.A. 77-450, § 5; 1977, P.A. 77-545, § 3; 1978, P.A. 78-243, § 1, eff. July 1, 1978; 1986, P.A. 86-236, § 3, eff. May 30, 1986; 1987, P.A. 87-215, § 5, eff. July 1, 1987; 1987, P.A. 87-533, § 9, eff. July 1, 1987.)

CONNECTICUT GENERAL STATUTES § 8-28

§ 8-28. Appeal from planning commission to superior court. Review by appellate court

(a) Notice of all official actions or decisions of a planning commission, not limited to those relating to the approval or denial of subdivision plans, shall be published in a newspaper having a substantial circulation in the municipality within fifteen days after such action or de-

[1] Section 22a-28 et seq.

cision. Except as provided in section 8-30, any person aggrieved by an official action or decision of a planning commission, including a decision to take no action, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies. In those situations where the approval of the planning commission must be inferred because of the failure of the commission to act on an application, any person aggrieved by such approval, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in such approval, may appeal therefrom within twenty days after the expiration of the period prescribed in section 8-26d for action by the commission to the superior court for the judicial district within which the municipality with such planning commission lies. Notice of such appeal shall be given by leaving a true and attested copy thereof with, or at the usual place of abode of, the chairman or clerk of said commission, and by serving a true and attested copy upon the clerk of the municipality, provided service upon the clerk of the municipality shall be for the purpose of providing additional notice of such appeal to said commission and shall not thereby make such clerk a necessary party to such appeal. The commission shall return either the original papers acted upon by it and constituting the record of the case appealed from or certified copies thereof. There shall be no right to further review except upon certification for review to the appellate court in the manner provided in section 8-8.

(b) The court, upon the motion of the person who applied for the commission's action or decision, shall make such person a party defendant in the appeal. Such defendant may, at any time after the return date of such

appeal, make a motion to dismiss the appeal. At the hearing on such motion to dismiss, each appellant shall have the burden of proving his standing to bring the appeal. The court may, upon the record, grant or deny the motion. The court's order on such motion shall be a final judgment for the purpose of the appeal as to each such defendant. No appeal may be taken from any such order except within seven days of the entry of such order.

(c) No appeal taken under subsection (a) of this section shall be withdrawn and no settlement between the parties to any such appeal shall be effective unless and until a hearing has been held before the superior court and such court has approved such proposed withdrawal or settlement.

(1949 Rev., § 861; 1951, Supp. § 165b; 1955, Supp. § 389d; 1963, P.A. 169; 1963, P.A. 273, § 2; 1965, P.A. 622, § 6; 1971, P.A. 501; 1971, P.A. 862, § 10, eff. Oct. 1, 1971; 1976, P.A. 76-436, § 294, eff. July 1, 1978; 1977, P.A. 77-450; § 7; 1978, P.A. 78-280, § 1, eff. July 1, 1978; 1980, P.A. 80-151; 1981, P.A. 81-154; 1982, P.A. 82-472, § 21, eff. June 14, 1982; 1983, June Sp.Sess., P.A. 83-29, § 59, eff. July 1, 1983; 1984 P.A. 84-227, § 2; 1985, P.A. 85-284, § 4, eff. Oct. 1, 1985; 1988, P.A. 88-79, § 2, eff. April 20, 1988; 1988, P.A. 88-364, § 75, eff. June 8, 1988.)

LAND SUBDIVISION REGULATIONS

of the

TOWN OF MONROE, CONNECTICUT

In accordance with the provisions of Chapter 126 of the 1958 Revision of the General Statutes of the State of Connecticut, as amended, the Town Planning and Zoning Commission of the Town of Monroe, Connecticut, hereby adopts the following regulations as the Land Subdivision Regulations of the Town of Monroe. All prior regulations are hereby rescinded. These regulations apply to all land within the Town of Monroe. The purpose of these regulations is to provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewage and, that the proper provision shall be made for protective flood control measures, and that the proposed streets are in harmony with existing or proposed principal thoroughfares in said town, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width as to provide an adequate and convenient system for present and prospective traffic needs and fire safety, and to provide for open spaces for parks and playgrounds, for open spaces, for recreation, light and air.

TOWN PLANNING & ZONING COMMISSION

Marion Callo, Acting Chairman
Harry Magazian, Acting Secretary
Harry Hagan
P. John Millo
James A. Marsilio

Daniel A. Tuba, Plan. Administrator

Effective date of these regulations
January 25, 1972

Effective date of last amendment
March 1, 1976

3.4 *Open Spaces*: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.

The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

SUPERIOR COURT
JUDICIAL DISTRICT OF FAIRFIELD
AT BRIDGEPORT

SEPTEMBER 22, 1993

CV92 0293224 S
CV92 0294797 S

TOWN OF MONROE

v.

JOHN MANDANICI, JR., *et al.*

MEMORANDUM OF DECISION

Two cases of foreclosure of tax liens have been filed by the Town of Monroe against premises owned by the defendant John A. Mandanici, Jr. and known as 2 and 36 Fairlea Drive. The plaintiff alleges unpaid tax liens for October 1, 1986, October 1, 1987, October 1, 1988, October 1, 1989 and October 1, 1990 on both lots. The defendant Mandanici answers in both cases are duplicates and consist of an admission of ownership and a denial of the remaining allegations. By way of counterclaim the defendant alleges that the Town by duress and imposition in 1986 caused him to agree to deed to the town 1.26 acres of open space land in order to have the subdivision, of which the open space land was a part, approved. He further claims that that parcel of land did not advance a legitimate state interest of the Town relative to the subdivision regulations, violates Article 1, Section 11 of the Connecticut Constitution and the Fifth and Fourteenth Amendments of the United States Con-

stitution, that the Town is unjustly enriched and that the Town holds the parcel in constructive trust for the defendant. By way of set off, the defendant alleges that by duress and imposition the plaintiff forced the defendant to spend money and incur costs in making additional and unnecessary improvements to the road, landscape and drainage system in the subdivision which was not part of the original approval.

Since both cases are exactly alike and the cases have been tried as one, this one Memorandum of Decision shall apply to both cases. The parties have stipulated that Lot No. 4 Fairlea Drive, Monroe, has a fair market value of $85,000.00 and Lot No. 8 Fairlea Drive, Monroe, has a fair market value of $95,000.00. They have also stipulated that $14,861.25 is the total amount of town taxes, interest and fees due on Lot No. 4 and $13,235,28 is the total amount of town taxes, interest and fees due on Lot No. 8 and that both amounts are unpaid. On the basis of the facts stated, the plaintiff is entitled to a foreclosure of its tax liens on both lots. The issue therefore is the counterclaim and set off filed by the defendant.

The court will cover the Set Off first since it will not require an extended discussion. The defendant claims that by duress and imposition he spent money and incurred costs in making additional and unnecessary improvements to the road, landscape and drainage systems, which were not part of the town' original approval. No evidence has been produced to indicate that he spent money or incurred costs of any kind, or that any additional and unnecessary improvements to the road, landscape or drainage systems were made. In fact, the Town's original approval containing its requirements for the subdivision were never submitted to the court nor was any evidence introduced of additional costs and unnecessary improvements being required by the Town or made by the defendant. This claim is without merit and judgment may enter for the plaintiff on the defendant's Set Off.

With respect to the question of the taking of an open space of 1.26 acres, the facts are found as follows. In 1976 the defendant was a partner of one Iannucci in the planned subdivision, and Iannucci submitted the subdivision map to the Town Planning and Zoning Commission (PZC) which contained the 1.26 acres area which was designated as open space and which the Land Division Regulations required and which reads as follows:

> 3.4 *Open Spaces*: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.
>
> The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of this subdivision.

The Submission of the parcel was not suggested or requested by anybody employed or authorized by the Town. It was offered by Iannucci because the subdivision regulations required it. The subdivision met with no success until 1986 when the defendant submitted the same map and a deed for the 1.26 acre parcel. Although the defend-

ant describes the lot as a building lot, it does not contain the required 150 foot frontage on the highway, and could not be used unles a variance of that requirement was granted. The subdivision contained thirteen acres and had been subdivided into eleven lots, one of which was the parcel in issue and represented approximately ten per cent of the development which the PZC was requiring of all subdivisions of ten or more lots and for which the PZC usually required ten per cent of the total acreage. It is the defendant's claim that he did not want to give the parcel and that the PZC would not consider the subdivision unless the parcel was forthcoming and so the defendant furnished them with the deed. The parcel has not been used in any manner by the Town or anyone else nor had it been used as a park or playground which section 3.4 specifies. However, the Land Subdivision Regulations provide as follows: ". . . and to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air."

This court has difficulty in following the defendant's argument that he was subjected to duress and imposition. The zoning regulation required providing for open spaces for parks and playgrounds and for recreation, light and air. Iannucci provided such an area when he submitted the original map in 1976 when the defendant was his partner. That same map was used for each presentation to the PZC including the last one in 1986, without any change. The defendant never said to the PZC he would not set aside such an area and he continued to provide at every opportunity. The Town counsel, when he insisted on the defendant providing a deed for that lot, was simply following the mandate of the subdivision regulations, which would enable the applicant to present an acceptable application. The defendant was never told he must deed the lot, he was told it was a requirement of the subdivision regulations. It was defendant's statement that he was under duress "because I had to give up something," however he admits he asked no official about

open spaces because it was in the regulations. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." *Smedley Co. v. Lansing,* 35 Conn. Supp. 578, 580. The town attorney honestly believed the PZC was entitled to receive the open space by virtue of the subdivision regulations and that belief was reasonable and therefore his conduct was not wrongful and did not constitute duress. See *Crittenden v. Royce,* 100 Conn. 617. "It is inherent in duress that the acts or threats, claimed to constitute, it should be wrongful. Restatement Contracts, Vol. 2 (492, Par. (g), p. 941." *Werner v. Minor,* 124 Conn. 92, 95. "Where one insists on a payment which he honestly believes he is entitled to receive, certainly unless that belief is without any reasonable ground, his conduct is not wrongful and does not constitute duress." *Werner v. Minor,* supra, 95. The defendant has failed to demonstrate duress by a preponderance of the evidence, or by any other degree of evidence.

The next issue raised by the defendant is that the regulation is unconstitutional in that it did not substantiate a legitimate town interest. The defendant first states that the regulations' constitutionality does not have to be considered since the taking was outside the scope of § 3.4 which only allowed a taking of open spaces for parks and playgrounds and not to provide a vacant lot. The PZC regulations must be read as a whole and include the statement preceding § 3.4 to the effect that they are to provide for open spaces for parks and playgrounds, for open spaces for recreation, light and air. While the lot has had no alterations or improvements to it since 1986, it could, if and when the need develops, become a park or playground. Just leaving it undeveloped does not mean that it could not at the appropriate point be developed into a park or playground. In addition, as it exists now, it provides light and air, two of the purposes of the regu-

lations. The defendant claims that *Nollan v. California Coastal Comm.*, 483 U.S. 825, 841, is controlling, wherein the court stated: ". . . our cases describe the condition for abridgement of property rights through the police power as a substantial advancing of a legitimate state interest." That case differs from the instant case in that the Commission made the issuance of a building permit conditional on a public easement for passage of the public to the beach. This restriction is applicable to all of the landowners' land i.e. the open space and is a restriction created specially for this piece of property and not of all property owners. The instant case concerns one lot out of eleven and the restriction is applied equally to every subdivision of more than ten acres or ten lots in the town, and in accordance with Nollan, it substantially advances a legitimate state and town interest, declared in § 8-23 Connecticut General Statutes entitled "PLAN OF DEVELOPMENT", and § 8-25 Connecticut General Statutes "Subdivision of Land" which provides for open spaces, parks and playgrounds. *Aunt Hack Ridge Estates, Inc. v. Planning Commission,* 160 Conn. 109 held that a similar regulation requiring the land be set aside for open space, parks and playgrounds was valid and constitutional exercises of the police power of the town and the state statutes. "The party challenging a statute's constitutionality has a heavy burden of proof. The unconsitutionality must be proven beyond all reasonable doubt." *Bottone v. Westport,* 209 Conn. 652, 657, "if the ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Russo v. East Hartford,* 179 Conn. 250, 258. "We have held that a commission's power to regulate the use of land, where reasonable and important, does not constitute a taking of property without due process of law or just compensation. . . . Where the free exercise of one's rights of property is detrimental to the public interest, the State has the right to regulate reasonably

such exercise of conrol under the police power. . . . One who chooses to engage in subdividing land by that decision thus chooses also to be subject to the reasonable regulation of the local planning commission." *Whittaker v. Zoning Board of Appeals,* 179 Conn. 650. The unconstitutionality of the PZC's zoning regulations with respect to the requirement for open spaces, parks and playgrounds has not been proven beyond all reasonable doubt. The lot is a "passive park", i.e., it is set aside for that purpose and can be utilized at any point. The "Plan of Development" of Monroe provides in ¶ 6 . . . "*Recreation and Open Space.* Opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well being of the community." That section sets as policy that open space be within a reasonable distance of all residents' homes, and that recreational facilities and programs should be available; and that the town adopt a schedule of open space acquisition providing for all types of activities. It therefore serves legitimate governmental purposes and substantially advances legitimate state and town interests, both which are described in the state statutes in § 8-23 and § 8-25 of the Connecticut General Statutes and the PLA Regulations, and which are a valid exercise of the town's police powers. See *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365; *Agins v. City of Tiburon,* 447 U.S. 259, 261 n.8.

Because of the rulings hereinbefore made, it is not necessary to discuss the defendant's claim of a constructive trust of the lot and the remedy therefore.

Query as to whether the defendant's counterclaim is legally involved in this case since, while the counterclaim arises out of the same subdivision, the complaint involves two lots of the subdivision on which taxes are due and owing and the counterclaim involves a third lot which was deeded for open space. It would appear that the com-

plaint and counterclaim do not arise out of the same transaction, nor do they arise out of any transaction which is the subject of the plaintiff's complaint.

Judgment may enter for the plaintiff on the complaint granting a strict foreclosure on the premises known as 2 Fairlea Drive for the tax liens for October 1, 1986, 1987, 1988, 1989 and 1990. The total debt due thereon is found to be $14,861.25 which includes interest and fees as of August 2, 1993. The value of the premises is found to be $85,000.00. The law day for the defendant landowner is set as February 8, 1994, for the encumbrancer Federal Deposit Insurance Corporation as February 10, 1994, and for the encumbrancer New England Building Products, Inc. February 9, 1994. A strict foreclosure on 36 Fairlea Drive may enter for the tax liens of October 1, 1986, 1987, 1988, 1989 and 1900. The total debt found to be due thereon is found to be $13,235.28 as of August 2, 1993, including interest and fees. The value of the premises are found to be $95,000.00. The law day for defendant landowner is set as February 8, 1994, for the encumbrancer New England Building Product, Inc. February 9, 1994, and for the defendant the Gateway Bank the date of February 10, 1994, on its mortgage dated October 24, 1990; February 11, 1994 on its mortgage dated July 21, 1989 and February 12, 1994 on its mortgage dated October 24, 1988.

Judgment may enter for the plaintiff on the Counterclaim and Set Off together with costs. The plaintiff is further entitled to recover interest from August 2, 1993 to the day of redemption.

/s/ Levine
LEVINE
State Trial Referee

APPELLATE COURT
OF THE STATE OF CONNECTICUT

JUDICIAL DISTRICT OF FAIRFIELD

No. A.C. 12922

TOWN OF MONROE

v.

JOHN C. MANDANICI

BRIEF OF THE DEFENDANT/APPELLANT JOHN C. MANDANICI

JOSEPH R. MIRRIONE
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To Be Argued By:

Joseph R. Mirrione

* * * *

he stated—to make it simple—he said it's much more politic to give them what they want in order to get your approval" (T 40-43). The trial court also stated that the court was "sure" that the Plaintiff's counsel was "perfectly aware of everything Mr. Mandanici said." (T 42).[1]

On redirect examination, Attorney Mandanici testified that Iannucci offered the 1.26 acres in the 1977 application map in order to get into the "good graces" of the Plaintiff, "the more you give the Town, the more likely they are to approve the subdivision." (T 49-50). On recross examination, Attorney Mandanici testified that he considered the open spaces that was deeded to the Plaintiff to be "what you might call the ransom to get the subdivision approved." (T 52).

* * * *

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[1] The Defendant's trial counsel objected to the question as to why the open space issue had not been raised earlier. He stated that such a question goes to the defense of laches which had not been pleaded as a special defense to the counterclaim. The trial court at the very beginning of the trial ruled that it would not consider the defense of laches because it had not been pleaded. However, the trial court allowed the question not for the issue of laches since it was not before the court, but for the issue of duress which was before the court (T 7-8, 36-39).

SUPERIOR COURT
J.D. OF FAIRFIELD
AT BRIDGEPORT

AUGUST 13, 1993

CV 92-293224
CV 92-294797S

TOWN OF MONROE

vs.

JOHN C. MANDANICI, *et al.*

DEFENDANT'S REPLY AND SUPPLEMENTAL BRIEF

The Plaintiff in its initial Brief dated July 14, 1993, pp. 2-3, states that the Conn. Gen. Stat., Sec. 8-25 allowing for the taking of open spaces does not violate any of the Defendant's constitutional rights. However, of the 4 cases cited by the Plaintiff, the last two, *Michael Weatherly v. Town Plan and Zoning Commission of Fairfield,* 23 Conn. App. 115 (1990) and *Raybestos Manhattan v. Planning & Zoning Commission of Trumbull,* 186 Conn. 466 (1982) are not on point because they concern the taking of roads which are essential to a subdivision.

The other two cases cited, *Aunt Hack Ridge Estates v. Planning Commission of the Town of Danbury,* 27 Conn. Supp. 74 (1967), and *Aunt Hack Ridge Estates v. Planning Commission of the City of Danbury,* 160 Conn. 109 (1970), are apparently the

* * * *

holds that whenever a landowner must yield a property interest to get zoning permission such a "yielding of the property interest cannot be regarded as establishing (a) voluntary exchange." *Nollan, supra,* 483 U.S. at 834, footnote 2.

Furthermore, the person who offered the land in 1977, Lawrence Iannucci, obviously did not do it out of the goodness of his heart nor did he come to the 10% figure all on his own since the 10% figure was, according to Tuba, the going rate that the Town or Mr. Tuba would demand in order to approve such a subdivision.

When the land was offered in 1977, the cost of the land was not of much significance if the Town approved the subdivision and allowed the owners to develop it to its full potential at that time. The cost of the lot might be a normal expected business cost if the subdivision was approved in a normal fashion. When the owners offered the land in 1977, no one could foresee how far from the normal the whole procedure would be in order to finally get approval. The owners submitted 4 different subdivision applications all of which were rejected by the Town. There were 4 applications and 4 appeals all with legal costs and expenses. The owners prevailed on the second appeal in 1986 (See *Iannucci v. Planning & Zoning Comm. of Monroe*, Fairfield J.D. No. 118024). What might have been close to being a voluntary act in 1977 of offering the land in exchange for quick approval was no longer a voluntary act in 1986 when the land was deeded to the Town because the court costs and the cost of the delay of 9 years had caused a great loss in project's profits and a donation of a $50,000.00 piece of land now took on much greater dimension.

In 1986 after the appeal was won on other issues, and the matter was remanded for a new hearing where the application could again be rejected still on other grounds, the Town demanded the 1.26 acres as a condition of it approving the subdivision. The *Nollan* case had not yet

been decided. If the Defendant wanted to make an issue of the 1.26 acres, and refused to deed it to the Town then the Town clearly would have denied the application. After 9 years of delays, the Defendant could not afford any more delays and chose not to make an issue of the 1.26 acres so that he could finally develop the rest of the subdivision.

Since *Nollan* describes some zoning boards as having "an out and out plan of extortion" in getting landowners to give up

* * * *

PLAN OF DEVELOPMENT
MONROE, CONNECTICUT

1976

Recreation and Open Space

Opportunities for passive and active recreation in locations accessible to residents, and preservation of the ecological balance and exhaustible natural resources of the area are essential to the continued health and economic well-being of the community. Serious consideration should be given to acquiring and developing land for water oriented recreation along the shore of Lake Zoar.

Policies

1. Some publicly accessible open space should be within reasonable distance of all resident's homes and major centers of employment.

2. A variety of recreational facilities and programs should be available to residents of all ages.

3. The Town should adopt a schedule of open space acquisition, preserving outstanding features, such as brooks and streams, providing for activities such as walking, skating, bicycling and riding, and reserving land topographically unsuited for intensive development.

4. It is desirable for the Town to control brooks and streams, to preserve the storm run-off system and to assure town access for maintenance of stream flow. This can be accomplished in part through Subdivision Regulations, and through cluster development design.

5. Recreation facilities should be available for use over the longest periods of time that are feasible.

6. Bikeways, both separate and as a part of the Town roadway system, should be provided to connect recreation,

open space and other public facilities with existing and new subdivisions and other urban residential areas.

Planning for open space should be coordinated with the Conservation Commission, with consideration for and co-operation with State and other groups and individuals working for the preservation of open space and natural resources.

A reasonable percentage of each subdivision should be permanently reserved for open space.

The location of open space should be related to and consistent with the goals of the Plan of Development, and of the Conservation Commission, and other recognized open space plans. The inclusion of small land areas as open space should be avoided, except where they serve a desirable and specific purpose, or where they are part of a long range goal.

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

(3)

No. 94-1207

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.
PETITIONER

V.

TOWN OF MONROE
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE
APPELLATE COURT OF CONNECTICUT

PETITIONER'S REPLY BRIEF

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I. REPLY TO FACTUAL ASSERTIONS

The respondent in its brief, pp. 8,11, contends that the trial court found that the petitioner "voluntarily" deeded the land to the respondent and that there was "no ... imposition". As discussed infra, the trial court never made such findings.

II. REPLY REGARDING JURISDICTION

The respondent in its brief, pp. 13-16, has raised the issue of subject matter jurisdiction which was never raised in the Connecticut courts. The Connecticut law clearly does not support the respondent's current position. The respondent in its brief, p. 14, contends that the petitioner's claims are barred for lack of subject matter jurisdiction because in "Connecticut, the rule is **absolutely clear that all claims** pertaining to a subdivision application granted or denied must be litigated as part of an administrative appeal."(emphasis added). The respondent also states that "(u)nder Connecticut General Statutes, Section 8-28, a party aggrieved by the action of a planning and zoning commission in connection with a subdivision has the right to file an administrative appeal of such conduct. It is the **only right**. An aggrieved party may not collaterally attack a municipal act for which it has a statutory right to institute an administrative appeal..." (emphasis added). On page 14 of its brief, the respondent claims that "(i)n the absence of a proper appeal under Connecticut General Statutes, Section 8-28, the court has no subject matter jurisdiction." As authority for the last claim, the respondent cites Upjohn Co. v. Zoning Board of Appeals, 224 Conn. 96, 104, 616 A2d 793 (1992), and Butzgy v. Town of Glastonbury, 203 Conn 109, 114, 116, 523 A.2d 1258 (1987). The respondent in its brief, p. 15, concludes that "(s)imply stated, Petitioner's claim is barred because of his failure to raise it as part of the 1986 subdivision approval which was conditioned upon the land dedication."

Thus, according to the respondent there are no exceptions to the rule that a party can only challenge a zoning authority by means of a statutory appeal. However, not only does the general law refute the respondent's current claim but the two specific cases cited by the respondent clearly reject the respondent's claim. The case cited by the respondent of Upjohn Co. v. Zoning Board of Appeals, supra, 224 Conn. at 101, actually states that "certain actions of zoning authorities may be attacked in an independent action after the time period for an appeal has passed." More importantly, the Butzgy case cited by the respondent specifically holds that such a rule against a non statutory appeal is "subject to a few limited exceptions, one being that a party may bring an independent action to test certain **constitutional** issues without first having resorted to an administrative appeal." Butzgy v. Glastonbury, supra, 203 Conn. at 121 (emphasis added). The court in Butzgy cited Connecticut Light and Power Co. v. Norwalk 179 Conn 111, 117, 425 A.2d 576 (1979) where it was held that the "failure to exhaust administrative remedies is not however equally conclusive when the issue is the **constitutional propriety of the procedures** used by the administrative agency in discharge of its statutory responsibility. Although such questions also might have been raised on direct appeal, we are not prepared to say that direct appeal is necessarily the exclusive route for testing basic **constitutional infirmity**." (emphasis added). In Friedson v. Westport 181 Conn. 230, 233,435 A.2d 17 (1980) it was held a party can bring a separate action independent of a statutory right of appeal from an administrative agency if the independent action challenges "the **constitutionality** of the [agency's] actions." (emphasis added). A collateral attack can be brought to test the "validity of [a] zoning regulation". Beacon Falls v. Posick 17 Conn. App. 17, 39, 549 A.2d 656 (1988), reversed on other grounds, 212 Conn 570, 563 A.2d 285 (1989).

Since the petitioner has clearly focused his independent action on the unconstitutionality of the respondent's acts, then the Court has subject matter jurisdiction. This Court itself has noted that the "doctrine of exhaustion of administrative remedies .... is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions" and should not "be applied blindly in every case." McKart v. United States, 395 U.S. 185, 193, 201, 89 S.Ct. 1657, 23 L.Ed. 2d 194 (1969).

Moreover, Connecticut law also allows independent actions seeking equitable relief. In Bianco v. Darien 157 Conn 548, 553-554, 254 A.2d 898 (1969), the court first noted the above general rule disfavoring an independent action when a party did not pursue a statutory right of appeal. However, the court ruled that the case before the court was "an action seeking **equitable relief** ... involv(ing) an alleged course of conduct by the plaintiffs and various town officials over a period of **thirty-six years**. The relief sought and the issues raised are distinctly **equitable** in nature. To hold that the plaintiffs had an adequate remedy at law which required that they exhaust their administrative remedies before the zoning board of appeals is to ignore the claims made and the nature of the action." Id., (emphasis added). Thus the passage of time, such as in the present case, can actually be a factor which shows why such independent actions should be allowed and why it is unfair to only allow actions that must be brought within a short and arbitrary period of time. In Reynolds v. Soffer, 183 Conn. 67, 69-71, 438 A.2d 1163 (1981), the court rejected a defendant's claim of lack of jurisdiction due to the plaintiff's failure to exhaust administrative remedies and rejected the "defendants' argument that the plaintiff's allegations do not merit equitable ... relief."

As noted in the Petition For A Writ Of Certiorari (hereafter referred to as Petition) pp. 6, 11, fn 1, the petitioner's counterclaim sought the equitable relief of a

constructive trust based on Connecticut common law. As mentioned in the petitioner's brief to the Appellate Court of Connecticut, pp. 1, 14-17, in Connecticut the common law allows for the "imposition of a constructive trust by **equity** (as) a remedial device designed to prevent unjust enrichment.... In order for a constructive trust to be imposed, the plaintiff must allege fraud, misrepresentation, **imposition**, circumvention, artifice, or concealment or abuse of confidential relations." Wing v. White 14 Conn App. 642, 644, 542 A.2d 748 (1988) (emphasis added) "A constructive trust arises ... against one who ... by duress or ... by commission of wrong, or by any form of unconscionable conduct,...or questionable means or who in **any way against equity** and good conscience, either has **obtained or holds** the legal right to property which he ought not in **equity** and good conscience, hold and enjoy." Spatola v. Spatola 4 Conn App. 79, 81, 492 A.2d 518 (1985) (emphasis added). In the present case, although the trial court found that there was no duress, the court did not discuss the other factors such as imposition which could cause a constructive trust. The court found that it was "not necessary to discuss the (petitioner's) claim of a constructive trust" in light of the court's rulings against the petitioner on his constitutional claims. (Petition, App. pp. 9a, 11a).

The respondent in its brief, p. 15, asks this Court to take guidance from Justice Souter's opinion as a state court justice in Town of Auburn v. McEvoy 553 A.2d 317 (1988). However, Justice Souter filed a dissenting opinion in Dolan v. City of Tigard 512 U.S. ___, 114 S.Ct. 2309, 2330, 129 L.Ed. 2d 304 (1994). Since Justice Souter's opinion does not reflect the majority opinion in Dolan, this Court should not necessarily take guidance from his earlier view expressed in Auburn as to when cases like Dolan can be utilized by a landowner in court.

III. REPLY TO ARGUMENT CLAIMING NO UNCONSTITUTIONAL TAKING

The respondent in its brief, pp. 11-12, 18-19, attempts to broaden its open space regulation to include matters outside its scope. The open space regulation is Section 3.4 of the Monroe Land Subdivision Regulations which was fully quoted in the trial court's Memorandum of Decision (See Petition, App. p. 7a-8a) and is also fully quoted in the respondent's brief, p. 19. That subdivision regulation states in part that "(i)n all subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission." Since the trial court ruled that the land taken has not been used for parks and playgrounds (see Petition, App. p. 8a), then the respondent feels compelled to broaden the regulation by interpretation to include things such as light and air. However, Section 3.4 is unambiguous and needs no interpretation. It must be remembered that "zoning regulations are in derogation of common law property rights and should not be extended by implication." Melody v. Zoning Board of Appeals, 158 Conn. 516, 521, 264 A.2d 572 (1969). "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances....We have stated that courts are not at liberty to create an exception where [a legislature] has declined to do so." Freytag v. C.I.R. 501 U.S. 868, 873-874, 111 S.Ct. 2631, 2636, 115 L. Ed. 2d 764 (1991). "A zoning regulation must be interpreted in light of our ordinary rule that where the language of the statute is clear and unambiguous, the courts cannot, by construction, read into statutes provisions which are not clearly stated." Roraback v. Planning and Zoning Commission, 32 Conn. App. 409, 413 628 A.2d 1350 (1993). Where the statute's "language is plain and unambiguous, we go no further." Sanzone v. Board of Police Commissioners 219 Conn 179, 187, 592 A.2d 912 (1991).

Furthermore, the Master Plan mentioned in the respondent's brief, pp. 18-19, enjoys no special status as a surrogate subdivision regulation since it can only be used as an interpretative tool. A "town plan is merely advisory...(and) can operate only as an interpretive tool." Smith v. Zoning Board of Appeals, 227 Conn. 71, 87-88, 629 A.2d 1089 (1993). Also, even the preamble to Section 3.4 can only be used as an interpretive tool. See Jurgenson v Fairfax County,745 F.2d 868,885(CA4, 1984).

Since Section 3.4 is unambiguous when it states that the respondent can take "open spaces for parks and playgrounds", then a court can not add to it by stating that the respondent can take open spaces for other purposes such as for light and air. Such an interpretation allowing the respondent to take land for almost any purpose would surely violate the principles set forth in Dolan,supra, and Nollan v. California, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987).

Also, there is a maxim of statutory construction that "a more specific statute will be given precedence over a more general one, regardless of their temporal sequence." Busic v. United States, 446 U.S. 398, 406, 100 S.Ct. 1747, 1753, 64 L.Ed. 2d 381 (1980). A "maxim of statutory construction [is] that specific language covering the general subject matter...will prevail over general language of the same or another statute that might otherwise prove controlling." Gifford v. Freedom of Information, 227 Conn. 641, 661, 631 A.2d 252 (1993).

Thus, the respondent's attempt in its brief, pp. 18-19, to enlarge Section 3.4 by referring to the respondent's broad Master Plan must fail because Section 3.4 is unambiguous and thus allows no interpretation, and furthermore even if the broad wording of the Master Plan was incorporated into Section 3.4, the specific words of Section 3.4 control over any general words of the Master Plan.

The key issue is not so much whether Section 3.4 is unconstitutional on paper but whether its application in this specific case was unconstitutional in light of the principles set forth in Nollan and Dolan. Section 3.4 could be constitutional if there was a need for specific open spaces to lessen the impact of a specific subdivision but Section 3.4 becomes unconstitutional when it blindly and capriciously demands 10% of any major subdivision as the price for approving such subdivisions. A government "must make some sort of individualized determination that the required dedication is related in both nature and extend to the impact of the proposed development" and it can not rely on its own "conclusory statement(s)". Dolan, supra 114 S.Ct. 2319-2320, 2322. A finding that the land demanded "could offset some" of the development's impact is insufficient. Id, 2322.

The respondent in its brief, pp. 20-25, attempts to satisfy the above requirement with ad hominem rhetoric and conclusory statements. The respondent first tries to downplay the need for such an individualized determination by concluding that the petitioner did not really care about the issue of open spaces and saw it as a "non issue" and he thus "voluntarily conveyed" the land to the respondent (see respondent's brief, p. 20, including fn 17). The respondent earlier in its brief, p. 11, erroneously states that the "trial court specifically found that there was no duress or imposition, but simply a decision by the Petitioner to voluntarily comply with a regulation for subdivisions of this nature." The trial court never found that the conveyance was voluntary and never decided whether the respondent committed an act of imposition when it demanded the land. The trial court ruled that the respondent's attorney "honestly believed" that the subdivision regulations permitted his request for the deed and therefore his actions were "not wrongful", and thus the court concluded that the petitioner "failed to demonstrate duress". (Petition, App. p. 9a). The trial court never decided the critical issue of whether the respondent imposed on the petitioner when

it demanded the land. "We think the word 'imposed' ... must be given the meaning which the standard dictionnaries give it ... : To lay as a burden, levy, inflict, or enforce; as by authority, power, or influence; as to impose taxes or penalties...." National Bank Of Commerce v. Allen, 223 F. 472, 477(CA 8, 1915). See Black's Law Dictionnary, Sixth Edition. Thus an imposition can be a legal rather than a wrongful act such as the legal imposition of a tax, and it is not the same as an act of duress. Although the trial court ruled that there was no duress (Petition, App. p. 9a), the court failed to contend with the overwhelming evidence that the respondent imposed a type of tax on the petitioner in that the respondent was required to pay up 10% of his subdivision to get the subdivision approved. Such an imposition in these circumstances results in a constructive trust. See Wing v. White, supra,.

The evidence establishing imposition included the court's finding that the respondent had "insisted on the (petitioner) providing a deed for the lot" (Petition, App. p. 9a). At the court hearing, the petitioner's attorney testified that the respondent's attorney told him in 1986 that "one of the conditions [for approval of the subdivision] was that we have to ... deed the land .... That was a condition of approval of the Town in 1986." (Trial transcript of July 15, 1993, hereafter referred to as T, p. 15). The trial court noted the petitioner's testimony that he "did not want to give" up the land but believed that he "had to give up" the land to get the approval for the subdivision. (Petition, App. pp. 8a, 9a). As mentioned in Nollan, supra, 483 U.S. 834, n. 2, "the yielding of a property interest [to get zoning approval] can not be regarded as establishing (a) voluntary exchange."

The scenario in the present case was the type of zoning extortion condemned in Dolan, supra, 114 S.Ct. 2317, and Nollan, supra, 483 U.S. 837. Extortion need not be a sinister demand but "can manifest itself in a more subtle form such as custom or expectation." United

States v. Ward 914 F.2d 1340, 1346 (CA9, 1990). See United States v. O'Connor, 910 F.2d 1466, 1468 (CA7, 1990). Thus, the act of the petitioner of deeding the land was never "a non issue" or "voluntary" but fit the typical pattern of someone who knows he must pay extortion quietly or suffer the consequences of having his subdivision application rejected. Concerning the issue of whether the deeding of the land was imposed and involuntary, this Court can make its own finding since the issue was previously undecided and also involves a mixed question of law and fact. See Fiske v. Kansas, 274 U.S. 380, 385-386, 47 S.Ct. 655, 71 L.Ed. 1108 (1927).

The respondent in its brief, p. 21, claims that the land taken "satisfied the Town's interest of providing an aesthetic and ecological balance for the area including the need for light land air ..." This is the type of self serving "conclusory statement" that this Court in Dolan ruled to be inadequate. Dolan supra 114 S.Ct., at 2322.

The respondent in its brief, p. 24, states that the "**Town decided that the set aside was roughly proportional and rationally related to its interest in providing open space for Town residents, not only those located near the subdivision but also all other Town residents.**" (emphasis added). However, the record is clear that no such decision on proportionality was ever made. The respondent's zoning officer, Daniel Tuba, testified that a study was never done as to whether the land given up by petitioner was needed to fulfill the needs of the respondent. He testified that the respondent has not had any discussion or plans to use the land nor was there any present intention as to what will be done with the land (T pp 115, 73-75). Tuba also testified that the respondent owns over 400 acres and that there was nothing unique about the open spaces taken from the petitioner anymore than any other open space set aside by a developer (T 80, 81). The lack of such an individualized decision by the respondent concerning proportionality is shown by the

court's finding that the respondent required all subdivisions of ten or more lots to give approximately ten percent of the development to the respondent as open spaces. (Petition, App. p. 8a). Furthermore, the court's findings that the land "has not been used in any manner by the (respondent) or anyone else nor had it been used as a park or playground" (Petition App. p. 8a) only tends to refute any claim that the respondent actually made any individual decision on why the land was needed. The lack of use shows a lack of a decision on how it would be used.

The respondent in its brief, p. 21, refers to this Court's previous ruling in Agins v. City of Tiburon 447 U.S. 255, , 100 S Ct. 2138, 65 L Ed. 2d 106 (1980) which recognized the importance of open space regulations. However, a government can only take land from a developer if that government can make an individualized determination that the land taken is related both in nature and extent to the impact of the development. Dolan, supra, 114 S.Ct. 2319-2320. If the open space is merely part of a "comprehensive program" serving the public interest, then the government can still take the land "by using its power of eminent domain...but if it wants [the land] **it must pay for it.**" Nollan v. California, supra, 483 U.S. 841-842. (emphasis added). Moreover, in the present case the respondent could have successfully defended the claim of constructive trust with a defense of laches if it had made "expenditures for improvements" on the land. See Lake Caryonah Imp. Ass'n v. Pulte Home Corp., 903 F.2d 505, 510(CA7, 1990). But the respondent not only never paid for the land but never spent a dime on it. If the respondent wants to keep the land, then the respondent should pay for it or provide an individualized determination that its taking is related both in nature and extent to the impact of the subdivision.

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